

16
No. 93-1631-CFX
Status: GRANTED

Title: Lloyd Bentsen, Secretary of the Treasury, Petitioner
v.
Coors Brewing Company

Docketed:
April 15, 1994

Court: United States Court of Appeals for
the Tenth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Oade Jr., K. Preston, Ennis, Bruce J.

2-22-94 ext til 3-31-94 & 3-22-94 ext til 4-15-94,
J. Ginsburg, CITED.

Entry	Date	Note	Proceedings and Orders
1	Feb 18 1994	G	Application (A93-691) to extend the time to file a petition for a writ of certiorari from March 1, 1994 to March 31, 1994, submitted to Justice Ginsburg.
2	Feb 22 1994		Application (A93-691) granted by Justice Ginsburg extending the time to file until March 31, 1994.
3	Mar 21 1994	P	Application (A93-691) to extend further the time to file a petition for a writ of certiorari from March 31, 1994 to April 15, 1994, submitted to Justice Ginsburg.
4	Mar 22 1994		Application (A93-691) granted by Justice Ginsburg extending the time to file until April 15, 1994.
5	Apr 15 1994	G	Petition for writ of certiorari filed.
6	May 17 1994		Brief of respondent Adolph Coors Company in opposition filed.
7	May 25 1994		DISTRIBUTED. June 10, 1994 (Page 3)
8	May 27 1994	X	Reply brief of petitioners filed.
9	Jun 13 1994		Petition GRANTED. *****
10	Jul 5 1994	G	Motion of respondent to substitute Coors Brewing Company in place of Adolph Coors Company filed.
12	Jul 26 1994		Order extending time to file brief of petitioner on the merits until August 5, 1994.
13	Aug 2 1994		Motion of respondent to substitute Coors Brewing Company in place of Adolph Coors Company GRANTED.
14	Aug 5 1994		Brief amicus curiae of Center for Science in the Public Interest filed.
15	Aug 5 1994		Brief amicus curiae of Council of State Governments, et al. filed.
16	Aug 5 1994		Joint appendix filed.
17	Aug 5 1994		Brief of petitioner Lloyd Bentsen, Secretary of the Treasury filed.
18	Aug 16 1994		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Tenth Circuit. (BOX)
20	Aug 18 1994		Order extending time to file brief of respondent on the merits until September 16, 1994.
21	Sep 6 1994		Brief amicus curiae of Wine Institute filed.
22	Sep 16 1994		Brief amicus curiae of Public Citizen filed.
23	Sep 16 1994		Brief amicus curiae of Beer Institute filed.
24	Sep 16 1994		Brief of respondent Coors Brewing Co. filed.

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No. 93-1631-CFX

Entry	Date	Note	Proceedings and Orders
25	Sep 16 1994	Brief amicus curiae of Washington Legal Foundation filed.	
26	Sep 16 1994	Brief amici curiae of United States Telephone Association, et al. filed.	
27	Sep 16 1994	Brief amici curiae of Association of National Advertisers Inc., et al. filed.	
28	Sep 30 1994	CIRCULATED.	
29	Oct 7 1994	SET FOR ARGUMENT WEDNESDAY, NOVEMBER 30, 1994. (1ST CASE).	
30	Oct 17 1994	X Reply brief of petitioner filed.	
31	Oct 17 1994	LODGING consisting of one copy of the California Dept. of Alcoholic Beverage Control Malt Beverage Regulations received from the Solicitor General	
32	Nov 30 1994	ARGUED.	

93-1631

In the Supreme Court of the United States

OCTOBER TERM, 1993

APR 15 1994

OFFICE OF THE CLERK

LLOYD BENTSEN, SECRETARY OF THE TREASURY,
ET AL., PETITIONERS

v.

ADOLPH COORS COMPANY

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

DREW S. DAYS, III

Solicitor General

FRANK W. HUNGER

Assistant Attorney General

EDWIN S. KNEEDLER

Deputy Solicitor General

RICHARD H. SEAMON

Assistant to the Solicitor General

Department of Justice

Washington, D.C. 20530

(202) 514-2217

110 Pp

QUESTION PRESENTED

Section 5(e)(2) of the Federal Alcohol Administration Act, 27 U.S.C. 205(e)(2), prohibits statements of alcohol content on the labels of malt-beverage containers unless such statements are required by state law. The question presented is whether that prohibition violates the First Amendment.

II

PARTIES TO THE PROCEEDING

Petitioners, the defendants below, are the Secretary of the Treasury and the Director of the Bureau of Alcohol, Tobacco and Firearms within the Department of the Treasury. Respondent, the plaintiff below, is the Adolph Coors Company. Also participating in the proceedings below were the Speaker and Bipartisan Leadership Group of the United States House of Representatives, which initially participated as defendants-intervenors but later withdrew from the case.

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No.

LLOYD BENTSEN, SECRETARY OF THE TREASURY,
ET AL., PETITIONERS

v.

ADOLPH COORS COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of the Treasury, et al., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-9a) is reported at 2 F.3d 355. The prior opinion of the court of appeals (App., *infra*, 10a-31a) is reported at 944 F.2d 1543.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1993. A petition for rehearing was denied on December 1, 1993. App., *infra*, 55a-56a. On February 22,

(1)

1994, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to and including March 31, 1994. On March 22, 1994, Justice Ginsburg further extended the time for filing a certiorari petition to and including April 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law * * * abridging the freedom of speech."

Section 5 of the Federal Alcohol Administration Act (FAAA), 27 U.S.C. 205, is reproduced at App., *infra*, 57a-65a.

Section 7 of the FAAA, 27 U.S.C. 207, provides in pertinent part:

Any person violating any of the provisions of section * * * 205 of this title shall be guilty of a misdemeanor and upon conviction thereof be fined not more than \$1,000 for each offense.

The relevant portions of 27 C.F.R. 7.26, 7.29, and 7.54 are reproduced at App., *infra*, 66a-72a.

STATEMENT

This case concerns the constitutionality of Section 5(e)(2) of the Federal Alcohol Administration Act (FAAA or Act), which prohibits the disclosure of statements of alcohol content on the labels of malt beverages. 27 U.S.C. 205(e)(2). Congress enacted the labeling prohibition to curb "strength wars" among brewers of malt beverages that arose in the wake of the repeal of Prohibition. The Tenth Circuit held that the labeling restriction in Section 205(e)(2) violates the First Amendment. We seek review of

that holding, which not only strikes down an Act of Congress the validity of which has been assumed for almost 60 years, but also casts serious doubt on the constitutionality of similar labeling restrictions that have been adopted by the majority of the States.

1. a. The FAAA, 27 U.S.C. 201 *et seq.*, was enacted "[i]n order effectively to regulate interstate and foreign commerce in distilled spirits, wine, and malt beverages, to enforce the twenty-first amendment, and to protect the revenue and enforce the postal laws with respect to distilled spirits, wine, and malt beverages." 27 U.S.C. 203; see also *Continental Distilling Corp. v. Shultz*, 472 F.2d 1367, 1369-1370 (D.C. Cir. 1972); *William Jameson & Co. v. Morgenthau*, 25 F. Supp. 771, 774 (D.D.C. 1938) (three-judge court), vacated for lack of substantial federal question, 307 U.S. 171 (1939) (*per curiam*). To carry out those purposes, Sections 3 and 4 of the Act require certain participants in the alcoholic beverage industry (not including brewers) to obtain a permit from the Secretary of the Treasury. 27 U.S.C. 203, 204. In addition, Section 5 of the Act, 27 U.S.C. 205, proscribes certain types of "[u]nfair competition" and "unlawful practices."¹

This case involves a challenge to the portions of Section 205(e) and Section 205(f) that prohibit statements of the alcohol content of malt beverages.² Section 205(e) requires

¹ Neither the FAAA nor any other federal statute regulates the amount of alcohol that malt beverages may contain. That matter has been left to the States, consistent with the long "history of state regulation of alcoholic beverages" and Congress's solicitude for the States' broad discretion in this area. See *Craig v. Boren*, 429 U.S. 190, 205-206 (1976); see also *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 107 n.10 (1980). In turn, many States restrict the alcohol content of malt beverages. See Defendants' Exhibit (DX) DA (at 272-273 (survey of state laws)).

² The term "malt beverage" is defined by statute (27 U.S.C. 211(a)(7)) and regulation (27 C.F.R. 7.10) as

the containers of alcoholic beverages to be labeled

in conformity with such regulations * * * [of the Secretary] (2) as will provide the consumer with adequate information as to the identity and quality of the products [and] the alcoholic content thereof (except that statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages are prohibited unless required by State law * * *).

Section 205(f) requires print and broadcast advertisements for alcoholic beverages to be

in conformity with such regulations * * * [of the Secretary] (2) as will provide the consumer with adequate information as to the identity and quality of the products advertised [and] the alcoholic content thereof (except the [sic] statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages and wines are prohibited).

Both Sections 205(e) and 205(f), however, are designed to operate in a manner consistent with state laws governing

[a] beverage made by the alcoholic fermentation of an infusion or decoction, or combination of both, in potable brewing water, or malted barley with hops, or their parts, or their products, and with or without other malted cereals, and with or without the addition of unmalted or prepared cereals, other carbohydrates or products prepared therefrom, and with or without the addition of carbon dioxide, and with or without other wholesome products suitable for human food consumption.

Thus, "malt beverage" encompasses all types of beer. For purposes of this case, it is important to distinguish the terms "malt beverage" and "malt liquor." While the term "malt beverage" includes "malt liquor," the latter term is not defined by the FAAA or regulations; rather, it is used in the industry to refer to the type of beer with the highest alcohol content. See App., *infra*, 7a n.4; C.A. App. 172.

wholly intrastate commerce in malt beverages.³

Implementing regulations prohibit the disclosure of alcohol content on beer labels, except where disclosure is required by state law (27 C.F.R. 7.26(a), 7.29(g)), and they similarly prohibit the disclosure of alcohol content in print and broadcast beer advertising (27 C.F.R. 7.54(c)). The prohibitions cover both numerical designations of alcohol content and descriptive terms suggestive of high alcohol content, such as " 'strong,' 'full strength,' 'extra strength,' 'high test,' 'high proof,' [and] 'full alcohol strength.' " 27 C.F.R. 7.54(c); see also 27 C.F.R. 7.29(f), (g). The prohibitions do not, however, preclude beer labels or other advertisements that identify a beer as "low" or "reduced" alcohol, "non-alcoholic," or "alcohol-free," in accordance with the Secretary's definition of those terms. 27 C.F.R. 7.26(b)-(d); see also 27 C.F.R. 7.29(f), 7.54(c). See p. 23, *infra*. The labeling prohibition is enforced by regulations requiring the bottlers of malt beverages to obtain certifi-

³ The penultimate paragraph of Section 205(f) provides in pertinent part:

In the case of malt beverages, the provisions of this subsection and subsection (e) of this section shall apply to the labeling of malt beverages sold or shipped or delivered for shipment or otherwise introduced into or received in any State from any place outside thereof, or the advertising of malt beverages intended to be sold or shipped or delivered for shipment or otherwise introduced into or received in any State from any place outside thereof, only to the extent that the law of such State imposes similar requirements with respect to the labeling or advertising, as the case may be, of malt beverages not sold or shipped or delivered for shipment or otherwise introduced into or received in such State from any place outside thereof.

See also 27 C.F.R. 7.20(a), 7.50.

cates of label approval from the Secretary. 27 C.F.R. 7.40-7.42; see also 27 U.S.C. 205(e).

b. Congress included restrictions in the FAAA on the disclosure of alcohol content in beer labeling and other advertising in order to curb "strength wars" among brewers that arose in the wake of the repeal of Prohibition by the Twenty-first Amendment. The FAAA replaced interim regulations under a voluntary code system that had been developed under the National Industrial Recovery Act and approved by the President for use after the repeal of Prohibition, pending the enactment of federal legislation addressing problems in the alcoholic beverage industry that could not adequately be addressed by the States.⁴ According to the committee reports on the bills that became the FAAA, the statute "[i]n general * * * incorporates the greater part of the system * * * enforced by the Government under the codes." H.R. Rep. No. 1542, 74th Cong., 1st Sess. 4 (1935); S. Rep. No. 1215, 74th Cong., 1st Sess. 3 (1935). The Tenth Circuit accordingly recognized in its first decision in this case that the history of the regulations adopted under the code system is relevant to interpretation of the Act. App., *infra*, 17a n.4.

The regulations initially proposed by the Federal Alcohol Control Administration (FACA) did not prohibit statements of alcohol content in beer labeling or advertis-

⁴ As discussed in the legislative history of the FAAA, the adoption of the Twenty-first Amendment "took place with unexpected speed." H.R. Rep. No. 1542, 74th Cong., 1st Sess. 3 (1935). The Amendment was proposed to the legislatures of the States by the Seventy-second Congress on February 20, 1933, and was ratified by the requisite number of States less than ten months later, on December 5, 1933. See *ibid.*; 76 Cong. Rec. 4565 (1933). Because Congress was not in session at that time, the President approved temporary regulation of the alcoholic beverage industry under the voluntary code system in order to fill the perceived regulatory vacuum. H.R. Rep. No. 1542, *supra*, at 3-4.

ing. *Hearing Before the FACA With Reference to Proposed Regulations Relative to the Labeling of Products of the Brewing Industry* (Nov. 1, 1934) (*FACA Hearing*), Clerk's Record (CR) 15, at 3-4. Instead, the proposed regulations prohibited only descriptive statements such as " 'full strength', 'extra strength', 'high test', 'high proof', [and] 'prewar proof'." *Id.* at 3. At the hearing on the proposed regulations, however, witnesses unanimously supported a broader prohibition that would bar even seemingly objective numerical designations of alcohol content. For example, the first witness at the hearing, George McCabe, counsel to the Brewers Code Authority, stated (*id.* at 7):

We would like a regulation of the F.A.C.A. which would outlaw any declaration of alcoholic content on labels for fermented malt liquors except in States where such a requirement is made by the State law. * * * [T]he alcoholic declaration has been productive of more deception than any one part of the label. Some brewers went haywire * * * and were trying to sell their beer on an alcohol basis, and they resorted, as you all know, to the use of all sorts of numbers and figures, numerals, to convey the impression that the beer contained an excessive amount of alcohol, which it did not contain.

Mr. McCabe then read a letter from a major brewer, which he described as "fairly expressive of the general sentiment of the industry," recommending that "all reference to alcoholic content * * * be eliminated from labeling [and] advertising," in light of the "trouble with this sort of thing during the past 18 months." *Id.* at 8. Other witnesses explained that, although "the legitimate brewer does not desire to sell his beer on the basis of alcohol," but rather "as a food product" (*id.* at 25), some brewers "seem[ed] to be of the opinion that to sell beer they should sell the

public alcohol" (*id.* at 29). The latter brewers' practice of disclosing alcohol content led "legitimate" brewers to conclude that "in order to meet competition it was necessary to increase the alcoholic content of the[ir] beer." *Id.* at 59. The witnesses predicted that a prohibition on statements of alcohol content would "get * * * beer back to a low alcoholic content." *Id.* at 73; see also *id.* at 33 ("if you just write the alcoholic content off the label, you are going to have a lower alcoholic content beer than you are if you require the alcoholic content to be stated on the label").

The House committee report on the bill that became the FAAA expressed the judgment that "[m]alt beverages should not be sold on the basis of alcohol content." H.R. Rep. No. 1542, *supra*, at 12. The report explained that "attempts to sell beer and other malt beverages on the basis of alcoholic content are attempts to take advantage of the ignorance of the consumer and of the psychology created by prohibition experiences." *Ibid.* The report found that "[l]egitimate members of the industry have suffered seriously from unfair competition resulting from labeling and advertising" that states alcohol content. *Ibid.* The report also found that "irrespective of th[e] falsity" of such statements, "their abuse has grown to such an extent since repeal that the prohibition of all such statements is in the interest of the consumer and the promotion of fair competition." *Id.* at 12-13. More broadly, the report found, based on "[e]xperience prior to prohibition," that the States "could not alone" protect their citizens from "unscrupulous advertising" and "deceptive labeling practices," due to "the diversity of their laws and the fact that practically all alcoholic beverage producers and large-scale distributors did an interstate business." *Id.* at 2-3.⁵

⁵ The Senate report similarly found that abusive "labeling or advertising" was one of the "serious social and political evils" that "were in large measure responsible for bringing on prohibition" and "that cannot be reached by the States." S. Rep. No. 1215, *supra*, at 6-7.

2. a. In April 1987, respondent, the Adolph Coors Company, applied to the Bureau of Alcohol, Tobacco and Firearms (ATF) within the Treasury Department for approval of labels and advertisements that included statements of the alcohol content of Coors' beer. C.A. App. 6-10. ATF denied the application based on Sections 205(e)(2) and 205(f)(2). App., *infra*, 73a-74a.

b. In July 1987, Coors filed this action against the Secretary and the Director of ATF in the United States District Court for the District of Colorado. Coors sought a declaratory judgment that the prohibition of alcohol content statements in Sections 205(e)(2) and 205(f)(2) and their implementing regulations violates the First Amendment; Coors also sought an injunction barring enforcement of those provisions. C.A. App. 5. On cross-motions for summary judgment, the district court held that the provisions violate the First Amendment, and it enjoined their enforcement. App., *infra*, 43a-54a.

c. The Tenth Circuit reversed. App., *infra*, 10a-31a. It applied the four-part test articulated in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), for analyzing restrictions on commercial speech.⁶ The Tenth Circuit first determined that Sections 205(e)(2) and 205(f)(2) regulate lawful activity that is not misleading. App., *infra*, 15a. The Tenth Circuit next held that those provisions are intended to further the federal

⁶ App., *infra*, 14a, quoting *Central Hudson*, 447 U.S. at 566:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

government's "substantial" interest in "maintain[ing] moderate levels of alcohol in beer in order to protect the consumer." *Id.* at 19a.⁷ But the court held that there were disputed issues of fact with regard to the third and fourth parts of the *Central Hudson* test. *Id.* at 21a-31a.⁸ It accordingly reversed the order granting summary judgment in favor of Coors and remanded to the district court for further proceedings. *Id.* at 31a.

3. a. On remand, the government introduced extensive evidence concerning current conditions in the malt beverage industry. Much of that evidence related to the malt liquor segment of the industry. See, e.g., C.A. App. 171-193. The government's evidence demonstrated that a primary reason why people drink malt liquor instead of other types of beer is to get drunk, C.A. App. 80, 88,⁹ and that malt liquor producers market their product by em-

⁷ The Tenth Circuit criticized the district court for "focus[ing] primarily on the validity of the asserted ends given the passage of time and changed circumstances." App., *infra*, 19a. The court of appeals found it "irrelevant that the circumstances giving rise to a particular piece of legislation have changed so long as the legislation continues to serve some valid and substantial government interest." *Id.* at 20a. The court of appeals concluded that the government had advanced "a legitimate and substantial interest" here by identifying "a continuing danger of strength wars similar to those that existed in 1935." *Ibid.*

⁸ The court of appeals determined that "the record here does not unambiguously reflect a correct legislative judgment that the enacted means directly advance the intended ends." App., *infra*, 21a. In the court's view, "the link between advertising and strength wars is not self-evident," *ibid.*, and there were "genuine issues of material fact underlying the question of whether * * * the complete prohibition of [statements of alcohol content] results in a 'reasonable fit' between the legislature's goal and the means chosen to reach it," *id.* at 31a.

⁹ See also, e.g., DXs AW (at 10), BZ (at 2), CD (at 9), CE (at 5), CI (at 19), CL (at 11, 17); Deposition of Hubert Nelson (Nelson Dep.) 10.

phasizing its potency, C.A. App. 201.¹⁰ The evidence included numerous recent cases of marketing efforts that violated the regulations prohibiting statements of alcohol content. See, e.g., C.A. App. 171-193; DXs C, D, and O through X. That evidence was not limited to the malt liquor segment of the market. C.A. App. 171, 174, 181, 187; DX AJ. It showed, for example, that Coors had distributed wallet cards listing the alcohol content of its own beers and those of its competitors. C.A. App. 171, 197-198; DXs AZ, BA, BB.

The district court upheld the advertising restriction in Section 205(f)(2), but it struck down the labeling restriction in Section 205(e)(2). App., *infra*, 32a-42a. The court found that there was a continuing threat of strength wars that justified a prohibition on statements of alcohol content in advertising, *id.* at 34a, but it regarded labeling as different because it believed that statements of alcohol content on labels would be used by consumers primarily to limit their intake of alcohol, *id.* at 37a.

b. Coors did not challenge the district court's ruling upholding Section 205(f)(2)'s prohibition of alcohol content statements in advertising. The government, by contrast, did appeal from the district court's ruling striking down the labeling restriction in Section 205(e)(2).¹¹

c. A different panel of the Tenth Circuit affirmed. App., *infra*, 1a-9a. The panel began by rejecting the government's contention that it was required, under the

¹⁰ See also, e.g., DXs B, C, D, BT, CA, CD (at 4), CE (at 5), CL (at 17), CS (at 11); Nelson Dep. 15, 25, 33, 123.

¹¹ ATF published an interim rule suspending enforcement of the regulatory provisions that implement the statutory labeling restriction. 58 Fed. Reg. 21,228 (1993). At the same time, ATF stated: "The Government continues to believe the [labeling] prohibition to be Constitutional." *Ibid.*

third part of the *Central Hudson* test, to show only that Congress "reasonably believed" that the labeling restriction would further the goal of preventing strength wars. The court expressed the view that this Court, in *Edenfield v. Fane*, 113 S. Ct. 1792 (1993), had adopted a "much stricter" standard for applying the third part of the *Central Hudson* test. App., *infra*, 5a.

The Tenth Circuit then held that, under the stricter test, the government had failed to show that the labeling restriction furthers the goal of preventing strength wars "in a direct and material way." App., *infra*, 7a.¹² The court recognized that the legislative history supported Congress's judgment that the labeling restriction would "result[] over the long term in beers with a lower alcohol content." *Id.* at 6a, quoting *id.* at 17a (first court of appeals decision). But focusing on perceived "changes in the malt beverage industry," the court determined that the government's evidence of a continuing threat of strength wars was insufficient in three ways. *Id.* at 6a-9a. First, the court discounted the evidence on the ground that it primarily concerned the malt liquor segment of the market. *Id.* at 7a. Second, the court believed that there was an "absence of any record evidence indicating that there are strength wars in states or other countries where alcohol content labeling is already required." *Id.* at 8a. Finally, the court was unable to discern any evidence that "Coors would engage in a strength war if it were able to disclose the alcohol content of its malt beverages." *Id.* at 8a-9a.¹³

¹² The court accordingly found it unnecessary to decide whether Section 205(e)(2) satisfies the "reasonable fit" requirement of the fourth part of the *Central Hudson* test. App., *infra*, 9a n.6.

¹³ The Tenth Circuit rejected the government's petition for rehearing and suggestion of rehearing en banc. App., *infra*, 55a-56a.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit has declared unconstitutional a long-standing Act of Congress that prohibits the disclosure of alcohol content on the labels of malt-beverage containers. The Tenth Circuit's decision rests in part on an error similar to the one that this Court granted certiorari to correct last term in *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2703 (1993). The Tenth Circuit here, like the Fourth Circuit in *Edge Broadcasting*, ignored that one of the goals underlying the challenged federal statute is to integrate its operation with a variety of state laws. The Tenth Circuit also erred by adopting a "much stricter" standard of review under the third part of the *Central Hudson* test than this Court has applied, and by ignoring historical and record evidence supporting the labeling restriction in Section 205(e)(2). The Tenth Circuit's errors warrant review by this Court, not only because the decision below invalidates an Act of Congress that directly advances the legitimate governmental interest in preventing strength wars, but also because it casts serious doubt on the validity of comparable labeling restrictions that have been adopted in the majority of the States.

1. a. In *Edge Broadcasting*, this Court granted certiorari "[b]ecause the court below declared a federal statute unconstitutional and applied reasoning that was questionable under [the Court's] cases relating to the regulation of commercial speech." 113 S. Ct. at 2703. The same is true here.

At issue in *Edge Broadcasting* were the federal statutes (18 U.S.C. 1304 and 1307) that prohibit lottery advertising in States that do not operate lotteries but permit lottery advertising in States that do operate lotteries. 113 S. Ct. at 2700-2701. The Fourth Circuit held that the statutes violated the First Amendment because, as applied to *Edge Broadcasting*, they "d[id] not directly advance the governmental interest asserted." *Edge Broadcasting Co. v.*

United States, 5 F.3d 59, 62 (1992) (per curiam), rev'd, *United States v. Edge Broadcasting Co.*, *supra*. The Fourth Circuit based its holding on the fact that Edge Broadcasting's listeners in North Carolina, a State that does not operate a lottery, were "inundated" with lottery advertisements from neighboring Virginia, which operates a lottery. *Ibid*. The Fourth Circuit decided that, with respect to that audience, the federal restriction provided only "ineffective or remote" support for "North Carolina's desire to discourage gambling." *Ibid*.

This Court reversed the Fourth Circuit's holding. *Edge Broadcasting*, 113 S. Ct. at 2704. The Court emphasized that the fact upon which the Fourth Circuit had relied did not mean that the federal statutes provided only "remote" support for the goal of protecting the interests of non-lottery States like North Carolina; it meant, instead, that the statutes supported the additional goal of protecting the interests of States, like Virginia, that have state-sponsored lotteries (*ibid.*):

In response to the appearance of state-sponsored lotteries, Congress might have continued to ban all radio or television lottery advertisements, even by stations in States that have legalized lotteries. This it did not do. * * * Instead of favoring either the lottery or the nonlottery State, Congress opted to support the anti-gambling policy of a State like North Carolina * * *. At the same time it sought not to unduly interfere with the policy of a lottery sponsoring State such as Virginia. * * * This congressional policy of balancing the interests of lottery and nonlottery States is the substantial governmental interest that satisfies *Central Hudson*, the interest which the courts below did not fully appreciate.

Like the Fourth Circuit in *Edge Broadcasting*, the Tenth Circuit in this case did not fully appreciate the federal interests underlying Section 205(e)(2)'s prohibition of state-

ments of alcohol content on malt-beverage containers. The Tenth Circuit recognized that Congress's central goal was to prevent "strength wars" among the brewers of malt beverages. App., *infra*, 4a. The Tenth Circuit ignored, however, the clear evidence of congressional intent to pursue that goal in a manner that would respect and facilitate, and not supplant, state regulation of alcohol pursuant to the Twenty-first Amendment.¹⁴ Congress might have chosen to prevent strength wars by enacting federal restrictions on the alcohol content of malt beverages, rather than restrictions on statements of their alcohol content. "This it did not do." *Edge Broadcasting*, 113 S. Ct. at 2704.¹⁵ Instead, Congress adopted a measure that reflects not only the goal of preventing strength wars but also the goal of respecting state authority over alcoholic beverages.

The Tenth Circuit's first error was in failing to discern any "link between advertising and strength wars." App., *infra*, 21a. There is a clear link, however, between dis-

¹⁴ One of the stated purposes of the FAAA is "to enforce the twenty-first amendment." 27 U.S.C. 203; see also *Arrow Distilleries, Inc. v. Alexander*, 109 F.2d 397, 401 (7th Cir.), cert. denied, 310 U.S. 646 (1940). The legislative history confirms that Congress was careful to adopt measures that were "appropriate and within the constitutional power of Congress," in light of the Twenty-first Amendment's recognition of each State's authority over "[t]he transportation or importation * * * of intoxicating liquors" across its border "for delivery or use therein." S. Rep. No. 1215, 74th Cong., 1st Sess. 3 (1935); H.R. Rep. No. 1542, 74th Cong., 1st Sess. 4 (1935); see also *Arrow Distilleries*, 109 F.2d at 400-401.

¹⁵ Congress could reasonably have concluded that it had authority to impose federal limits on alcohol content pursuant to its power to regulate interstate commerce. See 324 *Liquor Corp. v. Duffy*, 479 U.S. 335, 346-347 (1987); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 274-276 (1984); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-332 (1964).

couraging the purchase of beer on the basis of its high alcohol content and prohibiting statements of alcohol content in beer labeling and advertising. This Court has recognized as a matter of common sense that advertising stimulates consumer demand for the product being advertised. See *Edge Broadcasting*, 113 S. Ct. at 2707; *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 342 (1986); *Central Hudson*, 447 U.S. at 569. It should be equally self-evident that manufacturers are unlikely to compete with each other on the basis of a product characteristic that they cannot advertise. And if consumers cannot readily obtain information about a product's characteristic, they are unlikely to make purchases based on that characteristic.

The Tenth Circuit also failed to consider the matrix of state laws that Congress intended to respect in enacting the FAAA. As an initial matter, Sections 205(e)(2) and 205(f)(2) operate in tandem with state labeling and advertising laws applicable to wholly intrastate commerce in malt beverages. See pp. 4-5 & note 3, *supra*, and pp. 23-27, *infra*.

In addition, as witnesses at the FACA Hearing in 1934 explained, state alcohol regulations at that time (as now) often included restrictions on the alcohol content of malt beverages. *FACA Hearing* 10-11, 38-39, 60, 62, 75-76. Those restrictions differed from State to State (and continue to do so, see DX DA (at 272-273)). If a State imposes a restriction on alcohol content, the restriction reflects a judgment by that State regarding the maximum alcohol content appropriate for the health and welfare of its citizens. The FAAA's restrictions on the disclosure of alcohol content give effect to such a judgment by an individual State by making it less likely that a citizen of that State will travel to another State to purchase beer with a

higher alcohol content.¹⁶ In this respect, the FAAA provisions operate like the federal statute at issue in *South Dakota v. Dole*, 483 U.S. 203, 205 (1987), which conditioned federal highway funds on a State's enactment of

¹⁶ In a related context, this Court has recognized that people cross state lines to purchase beer at lower prices. See *Healy v. The Beer Inst.*, 491 U.S. 324, 326 (1989); *Falls City Indus., Inc. v. Vancor Beverage, Inc.*, 460 U.S. 428, 437 & n.8 (1983). It is just such behavior, which reflects the close connection between consumer purchasing decisions and product information, that has led the lower federal courts and the state courts to uphold, against First Amendment challenges, state restrictions on price advertising of alcoholic beverages. See *Queensgate Investment Co. v. Liquor Control Comm'n*, 433 N.E.2d 138 (Ohio) (per curiam), appeal dismissed for want of a substantial federal question, 459 U.S. 807 (1982); *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729 (R.I. 1985); *Rhode Island Liquor Stores Ass'n v. Evening Call Pub. Co.*, 497 A.2d 331 (R.I. 1985). "Common sense tells us that a lifting of the ban on price advertising will lead to a more competitive market." *44 Liquor Mart, Inc. v. Racine*, 829 F. Supp. 543, 554 (D.R.I. 1993); accord *S & S Liquor Mart*, 497 A.2d at 735. Part of the reason such restrictions reduce the consumption of alcohol, of course, is that they prevent alcohol vendors from engaging in price competition. Just as alcohol price advertising restrictions prevent "price wars," so too do alcohol content restrictions prevent "strength wars." The Tenth Circuit's contrary conclusion therefore cannot be squared with the case law concerning restrictions on price advertising. Cf. *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971) (upholding against First Amendment challenge ban on broadcast of cigarette advertising), *aff'd mem.*, 405 U.S. 1000 (1972); *Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983) (upholding against First Amendment challenge prohibition of most forms of alcohol sign advertising), *cert. denied*, 467 U.S. 1259 (1984); *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983) (rejecting First Amendment challenge to prohibition of all alcohol advertising except for one storefront sign), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Princess Sea Indus., Inc. v. State*, 635 P.2d 281 (Nev. 1981) (upholding against First Amendment challenge restrictions on brothel advertising), *cert. denied*, 456 U.S. 926 (1982).

laws prohibiting people under 21 years of age from possessing alcoholic beverages. This Court upheld that exercise of Congress's spending power, holding that the condition was "directly related to one of the main purposes for which highway funds are expended—safe interstate travel." *Id.* at 208.

In sum, the Tenth Circuit failed to identify the full governmental interests underlying the challenged federal statute, as did the Fourth Circuit in *Edge Broadcasting*. The federal restrictions on statements of alcohol content directly advance Congress's goals of ensuring that "[m]alt beverages should not be sold on the basis of alcohol content," H.R. Rep. No. 1542, 74th Cong., 1st Sess. 12 (1935), and supplementing state restrictions on labeling, advertising, and alcohol content.

b. Furthermore, the Tenth Circuit applied the wrong standard in analyzing Section 205(e)(2) under the third part of the *Central Hudson* test. The government acknowledged below that, under that part of the test, it was required to show that Section 205(e)(2) "directly advances" the interest in preventing strength wars among malt beverage producers. 92-1348 Gov't C.A. Br. 23. The government emphasized, however, that such a showing is not limited to evidence regarding current conditions in the beer industry; the court also had to consider whether "Congress 'reasonabl[y]' believed, 'when it enacted the [labeling] restrictions at issue here,' that the statutory prohibition would further its objective." *Ibid.*, quoting *Posadas*, 478 U.S. at 341-342. The government accordingly argued that both the legislative history of the labeling restriction and the evidence in the record regarding current conditions support the conclusion that the restriction directly advances the asserted governmental interest.

The Tenth Circuit rejected that position. It read this Court's decision in *Edenfield v. Fane*, 113 S. Ct. 1792 (1993), as adopting a "much stricter" standard for applying the third part of the *Central Hudson* test. App., *infra*, 5a. Applying a heightened standard, the court accorded no weight to the historical evidence, even though the court recognized that it supports Congress's judgment that the labeling restriction in Section 205(e)(2) would "result[] over the long term in beers with a lower alcohol content." *Id.* at 6a, quoting *id.* at 17a. Instead, based on perceived "changes in the malt beverage industry" (*id.* at 6a), the court required the government to demonstrate the "continuing validity" of that judgment (*id.* at 7a).

The Tenth Circuit misread *Edenfield*. *Edenfield* did not purport to heighten the showing required under the third part of the *Central Hudson* test, and the subsequent decision in *Edge Broadcasting* confirms that the third part of the *Central Hudson* test remains the same. 113 S. Ct. at 2704. Nor does *Edenfield* sanction the Tenth Circuit's disregard (App., *infra*, 6a-9a) of the historical evidence supporting Section 205(e)(2) in its second decision. See *Burson v. Freeman*, 112 S. Ct. 1846, 1856 (1992) (plurality); cf. *id.* at 19a (first court of appeals decision).

Indeed, the Tenth Circuit would have been justified in analyzing Section 205(e)(2) under a *less* stringent standard than this Court has required in *Central Hudson* and its progeny. Unlike the provisions at issue in those decisions, Section 205(e)(2) was intended to facilitate the enforcement of state laws regulating alcoholic beverages. In *California v. LaRue*, 409 U.S. 109 (1972), this Court held that, in a First Amendment challenge, such state laws are entitled to an "added presumption in favor of * * * validity." *Id.* at 118; see *id.* at 114 ("the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public

health, welfare, and morals"); see also, e.g., *City of Newport v. Iacobucci*, 479 U.S. 92, 95 (1986) (per curiam); *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) (per curiam); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-933 (1975). The same should hold true in a First Amendment challenge to federal laws, such as Section 205(e)(2), that complement state alcohol laws. To conclude otherwise would mean that a state law could be upheld while a federal law necessary to effective enforcement of the state law could be invalidated. Such a result would be particularly anomalous where, as here, the operation of the federal law and numerous state laws is closely integrated. See pp. 24-27, *infra*.

c. The Tenth Circuit's primary criticism of the government's showing under the third part of the *Central Hudson* test was that it "relie[d] primarily" on evidence regarding the malt liquor segment of the malt beverage industry. App., *infra*, 7a.¹⁷ The Tenth Circuit believed that evidence of a risk of strength wars among malt liquor producers did not justify a labeling restriction covering the entire industry. *Ibid*. The Tenth Circuit's analysis was flawed.

In the first place, the Tenth Circuit's analysis is at odds with the district court's unchallenged holding that the advertising restriction in Section 205(f)(2), which applies to all malt beverages, satisfies the third part of the *Central Hudson* test. App., *infra*, 34a. There is nothing in law or logic to support the conclusion that the same evidence that sustained the advertising restriction in Section 205(f)(2) does not also sustain the labeling restriction in Section

¹⁷ The government also presented evidence of unlawful statements of alcohol content outside the malt liquor segment of the market, including evidence concerning Coors' use of "wallet cards" comparing the alcohol content of its beers to those of its competitors. See C.A. App. 171, 174, 181-182, 186-187. The Tenth Circuit ignored that evidence.

205(e)(2). See *Kordel v. United States*, 335 U.S. 345, 351 (1948) ("Every labeling is in a sense an advertisement."); *Halter v. Nebraska*, 205 U.S. 34 (1907); see also *Hornell Brewing Co. v. Brady*, 819 F. Supp. 1227, 1237 (E.D.N.Y. 1993); Pa. Stat. Ann. tit. 47, § 4-493(8) (1969) (making it unlawful to publish or post "any advertisement of any malt or brewed beverage including a label" referring to alcoholic strength) (emphasis added).

The Tenth Circuit also erred by considering the labeling restriction in Section 205(e)(2) in isolation, without regard to the advertising restriction in Section 205(f)(2). The Tenth Circuit found the evidence insufficient to show that, in the absence of Section 205(e)(2), there would be strength wars. Even assuming that Section 205(e)(2) were insufficient by itself to prevent strength wars, however, that would not condemn the provision. Congress did not intend Section 205(e)(2) to bear that burden on its own. Section 205(e)(2) was intended to act in concert with Section 205(f)(2)'s restriction upon advertising.

d. In any event, the Tenth Circuit should have analyzed the question of whether Section 205(e)(2)'s prohibition of malt beverage alcohol content statements was overly broad (insofar as it applies to all types of beer and not just malt liquor) under the fourth (not the third) part of the *Central Hudson* test. The fourth part examines whether the challenged provision is "more extensive than is necessary" to achieve its asserted purpose. *Board of Trustees v. Fox*, 492 U.S. 469, 475-481 (1989). If the Tenth Circuit had properly examined the matter under the fourth part of the *Central Hudson* test, it would have been obligated to accord substantial deference to Congress's judgment on the "fit" between the legislative means and the legislative ends. *Id.* at 479-481; see *Edge Broad-*

casting, 113 S. Ct. at 2707; *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 539 (1987); *Posadas*, 478 U.S. at 341-342; *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509 (1981). There plainly is a reasonable fit between the prohibition of statements of alcohol content on beer labels and Congress's goal of preventing strength wars.

The Tenth Circuit thought that Congress could prevent strength wars equally effectively by prohibiting statements of alcohol content only with respect to malt liquor, and not with respect to other types of beer. See App., *infra*, 7a-8a. Congress, however, could reasonably have concluded otherwise. Congress's concern was not about a particular type of beer; its concern was about a particular type of beer-drinker: people who, in the absence of a prohibition on the disclosure of alcohol content, would choose a beer based on its alcohol strength. A universal labeling ban—*i.e.*, one applicable to all types of malt beverages—would more effectively prevent those people from choosing a malt beverage based on its high alcohol content than would a ban applicable only to malt liquor. First, a universal labeling ban would generally prevent consumers from knowing with certainty even that malt liquors, as a category, have higher alcohol content than other types of beer. II Tr. 194 (testimony of Coors official that “there are a percent of consumers who do not currently know that certain categories of beer have more or less alcohol”). In addition, a universal labeling ban would generally prevent consumers from choosing among brands of *any* type of malt beverage on the basis of their high alcohol content.

The differing operation of the universal labeling ban and a ban applicable only to malt liquor can be illustrated

by considering people who have just reached legal drinking age. Those young people, like many alcohol consumers at the end of Prohibition, may have a pent-up desire for intoxicating beverages. The young drinkers may not know that malt liquor is the type of beer with the highest alcohol content. They would readily be able to figure that out, however, if the disclosure of alcohol content was prohibited only with respect to beers the alcohol content of which exceeded a certain number.¹⁸

The fit between the labeling restriction in Section 205(e)(2) and the goal of preventing strength wars cannot be challenged on the ground that the restriction prevents persons from choosing beer on the basis of its *low* alcohol content. ATF has construed Section 205(e)(2) to permit brewers to label and advertise their beers as “reduced alcohol” and “low alcohol.” 54 Fed. Reg. 3591, 3594 (1989) (adding 27 C.F.R. 7.26(b)-(d)). Thus, Section 205(e)(2) only prevents people from selecting any type of beer because of its high alcohol content.¹⁹

2. Review of the Tenth Circuit's decision is warranted because it invalidates an Act of Congress that has governed the labeling of malt beverages for almost sixty years. Review is warranted for the additional reason that the decision below casts serious doubt on the constitutionality

¹⁸ For example, if the disclosure of alcohol content was prohibited with respect to beer that contained more than 5% alcohol, and was required for beer that contained 5% or less alcohol, a consumer could safely conclude that beer that did not disclose its alcohol content contained more than 5% alcohol.

¹⁹ The court of appeals also erred in believing that there was no evidence from other countries to support the effectiveness of the labeling restriction in preventing strength wars. App., *infra*, 8a. In fact, there was evidence in the record concerning Canada and Britain, where disclosure of alcohol content is permitted, suggesting that the labeling ban has the effect of preventing strength wars. C.A. App. 156, 220.

of numerous state laws that prohibit statements of alcohol content on malt-beverage containers.

Twenty-one States and the District of Columbia prohibit statements of alcohol content on the labels of some or all types of beer.²⁰ Included in this category is Utah,

²⁰ Ala. Code § 28-3A-6(c) (1986) (requiring brewers to file federal certificates of label approval with the State); Ariz. Comp. Admin. R. & Regs. R4-15-220(6) (1990) (requiring compliance with federal labeling requirements); Conn. Agencies Regs. § 30-6-A35(m) (1976) (expressly incorporating federal labeling requirements as state law); Del. Alc. Bev. Cont. Comm. Regs. Rule 13(b) (1991) (requiring compliance with federal labeling requirements); D.C. Mun. Regs. tit. 23, § 910 (1988) (incorporating federal labeling provisions in part); *Modern Brewery Age (Blue Book)* 267 (53rd ed. 1993) (digest of alcohol labeling requirements for D.C.); Ill. Admin. Code tit. 11, § 100.70(b)(9) (1991) (no beer containers "shall have affixed thereto any label or statement showing the alcoholic content thereof"); Alc. Bev. Comm'n of Ind. Bull. 23 (Aug. 4, 1938) (malt beverage labels may not indicate alcohol content by numerals or descriptive terms); Ky. Rev. Stat. Ann. § 244.520 (Bobbs-Merrill 1981) (malt beverage labels may not "refer[] in any manner to the alcoholic strength"); Me. Rev. Stat. Ann. tit. 28-A, § 711(1)(A) (West 1988) (malt beverage labels may not "refer[] in any manner to the alcohol content"); Mich. Admin. Code r. 436.1611 (1989) (requiring compliance with federal labeling requirements); N.J. Admin. Code tit. 13, § 2-27.1 (1990) (requiring compliance with federal labeling requirements); N.Y. Alco. Bev. Cont. Law App. § 84.6(a) (McKinney 1987) (prohibiting disclosure of alcohol content on malt beverage labels); Ohio Rev. Code Ann. § 4301.03(D) (Supp. 1993); Pa. Stat. Ann. tit. 47, § 4-493(7) (1969) (malt beverage labels may not "in any manner refer[] to the alcoholic contents"); R.I. Liq. Cont. Admin. Regs. No. 17 (1992) (federal labeling requirements "will be enforced" by State); S.C. Code Ann. § 61-13-800 (Law. Co-op. 1990) (requiring compliance with federal labeling requirements); S.D. Codified Laws Ann. § 39-13-11 (1987) (compliance with federal labeling requirements deemed compliance with state law); *Modern Brewery Age, supra*, at 271 (indicating that South Dakota requires malt beverage labels to state "[n]ot over 3.2% alcohol by weight," apparently precluding other statements of alcohol content); Tex. Admin. Code tit. 16, § 45.79 (1991) ("[t]he alcoholic

which is located in the Tenth Circuit. Several States in this category, including Utah, expressly incorporate Section 205(e)(2) of the FAAA or its implementing regulations.²¹ It is far from clear that any of the laws in this category would be upheld under the Tenth Circuit's analysis, even if they were accorded the "added presumption * * * of * * * validity" articulated in *California v. LaRue*, 409 U.S. at 118.

In addition, 20 States have adopted Section 205(e)(2)'s prohibition on alcohol content labeling by acquiescence — *i.e.*, by not requiring such statements on labels as a matter of state law.²² Two of those States, Wyoming and New

content * * * shall not be stated" on malt beverage labels); Utah Admin. R. 96-1-3(3) (1991) (requiring compliance with federal labeling requirements); Va. Alc. Bev. Cont. Bd. Regs. § 5(A)(3) (1991) (requiring compliance with federal labeling requirements); cf. Va. Code Ann. § 4.1-103.8 (Michie 1993) (Board may by regulation establish labeling requirements); W. Va. Non-Intox. Beer Comm'n Regs. § 176-1-3.1 (1990) ("[t]here shall not be any statement as to alcoholic content on the bottle and can label" of malt beverages); Wis. Admin. Code § 7.21 (Dep't of Revenue) (1991) (requiring compliance with federal labeling requirements).

²¹ See statutes and regulations cited in note 20, *supra*, for Alabama, Arizona, Connecticut, Delaware, Michigan, New Jersey, South Carolina, Utah, Virginia, and Wisconsin.

²² See *Modern Brewery Age, supra*, at 266-272, which indicates that the federal prohibition of malt beverage alcohol content statements on labels has been adopted, by virtue of the State's not requiring such statements, in 19 States: Alaska, Florida, Georgia, Hawaii, Iowa, Kentucky, Louisiana, Maryland, Massachusetts (with respect to malt beverages containing more than 3.2% alcohol by weight), Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Tennessee, Vermont, and Wyoming. Our research indicates that there are two additional States, Idaho and Washington, that adopt the federal prohibition by acquiescence, but that Kentucky has enacted its own statute prohibiting statements of alcohol content on malt-beverage containers, rather than simply acquiescing in the federal prohibition. See Ky. Rev. Stat. Ann. § 244.520 (Bobbs-Merrill 1981).

Mexico, are in the Tenth Circuit. The effect of the Tenth Circuit's decision is to invalidate a prohibition that has previously been in effect in those two States and to create uncertainty regarding the regulatory framework in the other 18 States as well. See note 20, *supra*.

Finally, 10 States require an alcohol content statement on labels of malt-beverage containers, but in most cases only with respect to beer above or below a certain alcohol percentage.²³ Included in this category are the two remaining Tenth Circuit States: Kansas and Oklahoma. The decision below casts doubt on the validity of those laws insofar as they prohibit alcohol content statements on the labels of some beer.

In sum, the vast majority of the States prohibit statements of alcohol content on malt beverage labels at least

²³ Ark. Alc. Bev. Cont. Div. Regs. § 2.17 (1991) (requiring malt beverages containing more than 5% alcohol by weight to be labeled as such); Cal. Code Regs. tit. 4, § 130 (1990) (prohibiting alcohol content statements on labels of malt beverages containing more than 4% alcohol by weight); Colo. Code Regs. § 46-112.3.C (1993) (malt beverage labels must indicate that alcohol content is not more than 3.2% by weight); Kan. Admin. Regs. §§ 14-7-2(c), 92-8-9a (1985) (malt beverage labels must state "does not contain more than 3.2% alcohol by weight"); Mass. Ann. Laws ch. 138, § 15 (Law. Co-op. 1981) (malt beverages containing 3.2% alcohol by weight or less "shall be so labelled"); Minn. R. § 7515.1110, subp. 2 (1985) (malt beverage labels must state "contains not more than 3.2 percent of alcohol by weight"); Mo. Rev. Stat. § 312.310 (Supp. 1993) (malt beverage labels must state "alcoholic content not in excess of [3.2% by weight or 4% by volume]"); Mont. Admin. R. § 42.13-201(2) (1993) ("[a]lcohol content by weight must be noted on the labels of all malt beverages" containing more than 7% alcohol by weight); Okla. Stat. Ann. tit. 37, § 163.19(b) (West 1985) (malt beverage labels may not indicate that alcohol content exceeds 3.2% by weight); Or. Admin. R. 845-10-205(2), (4) (1992); *Modern Brewery Age*, *supra*, at 270-271 (Oregon requires disclosure of alcohol content on labels of malt beverages containing more than 4% alcohol by weight).

under certain circumstances, either by positive law or by acquiescing in Section 205(e)(2)'s prohibition. As a result, the First Amendment issue raised by this case is of significant and far-reaching importance for numerous States as well as the United States. Review by this Court therefore is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General

APRIL 1994

APPENDIX A

**UNITED STATES COURT OF APPEALS
TENTH CIRCUIT**

No. 92-1348

ADOLPH COORS COMPANY, PLAINTIFF-APPELLEE

v.

**LLOYD BENTSEN,* IN HIS OFFICIAL CAPACITY AS SECRETARY
OF THE UNITED STATES DEPARTMENT OF TREASURY; AND
STEVE HIGGINS, IN HIS OFFICIAL CAPACITY AS DIRECTOR
OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
DEFENDANTS-APPELLANTS**

AND

**SPEAKER AND BIPARTISAN LEADERSHIP OF THE U.S. HOUSE
OF REPRESENTATIVES, INTERVENOR-DEFENDANT**

Aug. 23, 1993

**Before TACHA and BARRETT, Circuit Judges, and
BROWN, District Judge.****

* Lloyd Bentsen is substituted for Nicholas Brady pursuant to Fed.R.App.P 43(c)(1).

** Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

TACHA, Circuit Judge.

Appellants (collectively referred to as the "Government") appeal a district order declaring the portion of 27 U.S.C. § 205(e)(2) which prohibits statements of alcohol content on malt beverage labels to be an unconstitutional restraint on commercial speech in violation of the First Amendment. The Government also appeals the court's order enjoining the Government from enforcing that provision. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

I. Background

Congress enacted the Federal Alcohol Administration Act ("Act"), 27 U.S.C. §§ 201-211, in 1935 after the repeal of Prohibition. The Act contains comprehensive regulations of the alcoholic beverage industry, including provisions that were intended to remedy industry practices which Congress had determined were unfair, deceptive, and harmful to both competitors and consumers. Two such provisions prohibit statements of alcohol content on malt beverage¹ labels and advertisements unless such disclosures are required by state law. 27 U.S.C. § 205(e)(2), (f)(2).²

¹ "Malt beverage" is defined at 27 C.F.R. § 7.10.

² Section 205 provides in relevant part:

It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages . . . directly or indirectly or through an affiliate:

* * * * *

(e) Labeling

To sell or ship or deliver for sale or shipment, or otherwise introduce in interstate or foreign commerce, or to receive therein,

In 1987, Adolph Coors Co. ("Coors") sought the Bureau of Alcohol, Tobacco and Firearm's approval for proposed labels and advertisements that disclosed the alcohol content of its malt beverages. The bureau denied the request pursuant to § 205(e)(2) and (f)(2). Coors then brought this action to challenge the decision, arguing that the provisions impose an unconstitutional restraint on commercial speech in violation of the First Amendment.

The district court granted summary judgment for Coors and the Government appealed. On appeal, we evaluated

or to remove from customs custody for consumption, any distilled spirits, wine, or malt beverages in bottles unless such products are bottled, packaged, and labeled in conformity with such regulations, to be prescribed by the Secretary of the Treasury, with respect to packing, marking, branding, and labeling and size and fill of container . . . (2) as will provide the consumer with adequate information as to the identity and quality of the products, the alcoholic content thereof (*except that statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages are prohibited unless required by State law . . .*).

* * * * *

(f) Advertising

To publish or disseminate or cause to be published or disseminated by radio broadcast, or in any newspaper, periodical or other publication or by any sign or outdoor advertisement or any other printed or graphic matter, any advertisement of distilled spirits, wine, or malt beverages, if such advertisement is in, or is calculated to induce sales in, interstate or foreign commerce, or is disseminated by mail, unless such advertisement is in conformity with such regulations, to be prescribed by the Secretary of the Treasury, . . . (2) as will provide the consumer with adequate information as to the identity and quality of the products advertised, the alcoholic content thereof (*except the statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages and wines are prohibited*). . . .

27 U.S.C. § 205 (emphasis added).

the provisions under the four-part test for restrictions on commercial speech set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980):

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566, 100 S.Ct. at 2351. Applying the first two parts of the test, we concluded that the proposed labels and advertisements were commercial speech protected by the First Amendment and that the Government had asserted a legitimate and substantial interest in preventing strength wars among malt beverage brewers. See *Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1547-49 (10th Cir. 1991) ("*Coors I*"). We reversed and remanded, however, holding that there were genuine issues of material fact as to whether the statutory prohibitions directly advance the Government's interest in preventing strength wars and whether there is a reasonable fit between the Government's asserted interest and the complete prohibitions imposed by the statute. See *id.* at 1554.

After conducting a trial on remand, the district court held that the relevant portion of § 205(f)(2) is constitutional, but that the portion of § 205(e)(2) which prohibits statements of alcohol content on malt beverage labels imposes an unconstitutional restraint on commercial speech

in violation of the First Amendment because it neither directly advances nor reasonably fits the goal of preventing strength wars. The Government now appeals the district court's judgment with respect to § 205(e)(2) and we limit our review to that provision.

II. Discussion

The Government has the burden of proving that the labeling prohibition of § 205(e)(2) directly advances its interest in preventing strength wars.³ We stated in *Coors I* that the *Central Hudson* test requires "an immediate connection between the prohibition and the government's asserted end. If the means-end connection is tenuous or highly speculative, the regulation cannot survive constitutional scrutiny." 944 F.2d at 1549 (internal quotations omitted). The Government challenges this standard on appeal and, relying on *Posadas de Puerto Rico Association v. Tourism Co.*, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986), argues that the Government need only demonstrate that Congress reasonably believed that the statutory prohibition would further its objective when it enacted the labeling restriction. See *id.* at 341-42, 106 S.Ct. at 2976-77.

Since the Government filed its appellate brief, however, the Supreme Court has decided *Edenfield v. Fane*, ___ U.S. ___, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993), in which it articulates a standard that is consistent with our pronouncements in *Coors I* and much stricter than the "reasonably believed" standard the Government would have us adopt. In *Edenfield*, the Court stated that, under this third prong of the *Central Hudson* test, courts must

³ The parties do not dispute that the labeling of malt beverages' alcohol content is protected commercial speech under the first part of the *Central Hudson* test or that the Government has a substantial interest in preventing strength wars under the second part.

determine "whether the challenged regulation advances [the government's] interests in a direct and material way." *Id.*, at ____, 113 S.Ct. at 1798. It went on to say that the party restricting commercial speech carries the burden of justifying the restriction and that "[t]his burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.*, at ____, 113 S.Ct. at 1800. This burden also applies to prophylactic regulations like the challenged prohibition in § 205(e)(2) where the Government prohibits conduct at the outset rather than waiting until harm has occurred. *Id.*, at ____, 113 S.Ct. at 1803 (prophylactic ban "in no way relieves the State of the obligation to demonstrate that it is regulating speech in order to address what is in fact a serious problem and that the preventative measure it proposes will contribute in a material way to solving that problem").

The Government asserts that the prohibition on speech contained in § 205(e)(2) was imposed to prevent strength wars among malt beverage manufacturers. This assertion is supported by the Act's legislative history which contains testimony "that labels displaying alcohol content resulted in a strength war wherein producers competed for market share by putting increasing amounts of alcohol in their beer." *Coors I*, 944 F.2d at 1548. There was also hearing testimony "that not disclosing the alcohol content on malt beverages would relieve marketplace pressures to produce beer on the basis of alcohol content, resulting over the long term in beers with a lower alcohol content." *Id.* The Government argues that, despite changes in the malt beverage industry and market since 1935, § 205(e)(2) directly advances its crusade against the continuing danger of strength wars. After reviewing the record, we conclude

that, although the Government's interest in preventing strength wars is legitimate and is within its regulatory authority, the prohibition in § 205(e)(2) does not advance this interest in a direct and material way.

The Government relies primarily on anecdotal evidence that malt beverage manufacturers already are competing and advertising on the basis of alcohol strength in the malt liquor sector of the market.⁴ The record contains evidence that consumers who prefer malt liquor do so primarily because of its higher alcohol content and that a number of manufacturers have tried to advertise malt liquor—in violation of the regulations—by using descriptive terms such as "power," "strong character," "dynamite," and "bull" to tout its alcohol strength. On the basis of this evidence, the Government makes an inferential and conclusory argument that the "experience of the malt liquor industry establishes the continuing validity of the statutory scheme" as applied to all malt beverages as well as "the very real danger of strength wars if the labeling ban is struck down."

This argument is unavailing. Although the evidence may support the Government's assertion that there is a continuing threat of strength wars which it aims to prevent, Coors does not contest either the existence of such a threat or the Government's interest in preventing strength wars. The critical question is whether the evidence shows the required relationship between the labeling prohibition that Coors is challenging and the threat of strength wars. Coors is challenging the prohibition on factual statements

⁴ "Malt liquor" is the term used to designate those malt beverages with the highest alcohol content, whereas light beer and non-alcoholic beer are malt beverages containing reduced alcohol content. Malt liquors represent approximately three percent of the malt beverage market.

regarding the percentage of alcohol by volume rather than the prohibition on the sort of descriptive terms that have been used in the malt liquor sector.⁵ The Government simply has not shown a relationship between the publication of such factual information and strength wars.

The Government's argument is further undermined by the absence of any record evidence indicating that there are strength wars in states or other countries where alcohol content labeling is already required. See *Edenfield*, ____ U.S. at ____, 113 S.Ct. at 1800 (noting lack of anecdotal evidence from states that do not impose similar restrictions). In fact, there is uncontroverted evidence that brewers in the United States have no intention of increasing alcohol strength, regardless of labeling regulations, because the vast majority of consumers in the United States value taste and lower calories—both of which are adversely affected by increased alcohol strength.

Finally, the Government asserts that Coors is challenging the labeling restrictions because of its desire to counter a consumer perception that its malt beverages contain less alcohol than competing brands. This assertion, however, does not show directly, or even imply, that Coors would engage in a strength war if it were able to disclose the

⁵ The Act's implementing regulations distinguish these two types of statements. Coors is challenging the type of restriction contained in 27 C.F.R. § 7.26(a) which provides that "[t]he alcoholic content and the percentage and quantity of the original extract shall not be stated unless required by State law." Coors is not challenging § 7.29(f), which provides that "[l]abels shall not contain the words 'strong', 'full strength', 'extra strength' . . . or similar words or statements, likely to be considered as statements of alcoholic content." Nor does it challenge § 7.29(g), which provides that "[l]abels shall not contain any statements, designs, or devices whether in the form of numerals, letters, characters, figures, or otherwise, which are likely to be considered as statements of alcoholic content."

alcohol content of its malt beverages on their labels. In fact, the opposite inference is more plausible—if Coors could overcome the misperception by simply publishing the percentage of alcohol content on the label, it would have no incentive to produce stronger beverages.

We find that the Government has offered no evidence to indicate that the appearance of factual statements of alcohol content on malt beverage labels would lead to strength wars or that their continued prohibition helps to prevent strength wars. Instead, it has offered only inferential arguments that are based on mere speculation and conjecture and fails to show that the prohibition advances the Government's interest in a direct and material way.⁶ We therefore hold that the portion of 27 U.S.C. § 205(e)(2) which prohibits statements of alcohol content on malt beverage labels imposes an unconstitutional restraint on commercial speech in violation of the First Amendment.

AFFIRMED.

⁶ Because we conclude that the Government has failed to satisfy its burden under the third part of the *Central Hudson* test, we need not proceed to the fourth part to determine whether there is a reasonable fit between the prohibition and the Government's interest.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 89-1203, 89-1239

ADOLPH COORS COMPANY, PLAINTIFF-APPELLEE

v.

NICHOLAS BRADY, IN HIS OFFICIAL CAPACITY AS SECRETARY
OF THE UNITED STATES DEPARTMENT OF TREASURY;
STEVE HIGGINS, IN HIS OFFICIAL CAPACITY AS DIRECTOR
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
DEFENDANTS-APPELLANTS

AND

SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
INTERVENOR-DEFENDANT-APPELLANTCENTER FOR SCIENCE IN THE PUBLIC INTEREST;
G. HEILEMAN BREWING COMPANY, AMICUS CURIAE

Sept. 23, 1991

Before MCKAY, McWILLIAMS and SEYMOUR, Circuit
Judges.

SEYMOUR, Circuit Judge.

Nicholas Brady, Secretary of the Treasury, *et al.* (the Treasury), and intervenors Speaker and Bipartisan Leadership Group of the United States House of Representatives (the House), appeal the district court's grant of summary judgment in favor of Adolph Coors Co. (Coors). The district court ruled that 27 U.S.C. §§ 205(e) and 205(f) (1988), which prohibit the disclosure of alcohol content information in advertising or labeling malt liquor, constitute an illegal restraint on free speech in violation of the First Amendment, and enjoined the government's enforcement of the statute's restrictions. We reverse and remand.

I.

In 1987, Coors submitted an application to the Bureau of Alcohol, Tobacco and Firearms (BATF) requesting approval for labels and advertisements for its Coors and Coors Light beer that would disclose the alcohol content of these products. The BATF denied Coors' application stating that sections 205(e)(2) and 205(f)(2) prohibit labels or advertisements disclosing the alcohol content of malt beverages unless such disclosure is required by state law.¹

¹ 27 U.S.C. §§ 205(e)(2) and 205(f)(2) (1988) provide in relevant part:

"§ 205. Unfair competition and unlawful practices

"It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate:

". . . .

"(e) Labeling

"To sell or ship or deliver for sale or shipment, or otherwise introduce in interstate or foreign commerce, or to receive therein,

On July 2, 1987, Coors filed a complaint against the Secretary of the Treasury, and the Director of the BATF, alleging that sections 205(e) and 205(f) violate Coors' rights under the Free Speech Clause of the First Amendment because they prohibit Coors from disclosing truthful information as to the alcohol content of its malt beverages. Coors asked the district court to set aside the BATF's denial of Coors' labeling and advertisement application, and to declare the statutory sections invalid.

or to remove from customs custody for consumption, any distilled spirits, wine, or malt beverage in bottles, unless such products are bottled, packaged, and labeled in conformity with such regulations, to be prescribed by the Secretary of the Treasury, with respect to packaging, marking, branding, and labeling and size and fill of container . . . (2) as will provide the consumer with adequate information as to the identity and quality of the products, the alcoholic content thereof (except that statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages are prohibited unless required by State law and except that, in case of wines, statements of alcoholic content shall be required only for wines containing more than 14 per centum of alcohol by volume). . . .

“

(f) Advertising

To publish or disseminate or cause to be published or disseminated by radio broadcast, or in any newspaper, periodical or other publication or by any sign or outdoor advertisement or any other printed or graphic matter, any advertisement of distilled spirits, wine, or malt beverages, if such advertisement is in, or is calculated to induce sales in, interstate or foreign commerce, or is disseminated by mail, unless such advertisement is in conformity with such regulations, to be prescribed by the Secretary of the Treasury . . . (2) as will provide the consumer with adequate information as to the identity and quality of the products advertised, the alcoholic content thereof (except the statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages and wines are prohibited). . . .”

The Treasury admitted in its answer that sections 205(e)(2) and 205(f)(2) are unconstitutional under the First Amendment. The Justice Department, acting on behalf of the Treasury and BATF, also asserted that the Executive Branch believed restricting the labeling and advertising of the alcoholic content of malt beverages to be unconstitutional. The House, however, moved to intervene in order to defend the constitutionality of the statute.

The House and Coors filed cross-motions for summary judgment. Following a hearing, the district court issued an order holding that sections 205(e)(2) and 205(f)(2) constitute an illegal restraint on speech under the First Amendment, and enjoining the BATF from enforcing those provisions. The Treasury, which now defends the constitutionality of the statutory sections, and the House seek a reversal of the district court's order. The relevant facts and legal arguments presented to the district court and the legal conclusions drawn therefrom are summarized below.

II.

To review a summary judgment order, we apply the same standard used by the trial court under Fed.R.Civ.P. 56. *Osgood v. State Farm Mut. Auto Ins. Co.*, 848 F.2d 141, 143 (10th Cir.1988). Rule 56 directs that summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. This court determines whether, under the correct interpretation of the substantive law, there exist material factual disputes which preclude summary judgment. *See id.*; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986). In determining whether a material issue of fact exists, we review the record in the light most

favorable to the party opposing summary judgment. *McKenzie v. Mercy Hosp.*, 854 F.2d 365, 367 (10th Cir. 1988). The district court's conclusions of law are reviewed *de novo*. *Id.*

Commercial speech is that which does "no more than propose a commercial transaction." *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762, 96 S.Ct. 1817, 1825-26, 48 L.Ed.2d 346 (1976) (quoting *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385, 93 S.Ct. 2553, 2558-59, 37 L.Ed.2d 669 (1973)). Advertising has been recognized as commercial speech. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637, 105 S.Ct. 2265, 2274, 85 L.Ed.2d 652 (1985). Product labels, which are part of a firm's marketing plan to provide certain information to the consumer, also constitute commercial speech. *See id.*; *Central Hudson Gas v. Public Serv. Comm'n*, 447 U.S. 557, 563, 100 S.Ct. 2343, 2350, 65 L.Ed.2d 341 (1980) (noting that "[t]he First Amendment's concern for commercial speech is based on the information function of advertising").

Regulations limiting commercial speech that are challenged on First Amendment grounds are subject to a four-part analysis described by the Supreme Court as follows:

"At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest."

Central Hudson, 447 U.S. at 566, 100 S.Ct. at 2351.

A.

In order for commercial speech to come within the protection of the First Amendment under the first prong of the *Central Hudson* test, it must concern a lawful activity and not be misleading. *Id.* The labeling and advertising of malt beverages relate to an activity lawful under federal law. U.S. Const. amend. XXI, § 1 (repeal of Prohibition); *see also Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983) (although alcohol sales and consumption may be illegal in some state counties, such activity is nonetheless considered lawful for First Amendment purposes). Moreover, as the district court correctly noted, consumers have a substantial interest in knowing the alcohol content of beer. For example, many state statutes prohibit certain activities (such as driving) at or past a specific level of intoxication. Rec., vol. II, at 53. Consequently, restrictions on alcohol content disclosure are within the ambit of First Amendment protection.²

B.

Under the second prong of the *Central Hudson* test, we must assess the strength of the government's interest in regulating the disclosure of alcohol content. The legislative history introduced in evidence below reveals the Con-

² The House argued below that alcohol content disclosure is inherently misleading. The district court rejected this contention. On appeal, the Justice Department, on behalf of defendants, has taken the position that "accurate and specific statements of alcohol content by Coors of its malt beverages" would not be misleading. Opening Brief of Defendants-Appellants at 15. The House has apparently abandoned its position that disclosure of malt beverage alcohol content alone is misleading and does not urge the position as a basis for reversal. *See* Opening Brief of Intervenor-Defendant-Appellant at 26-27 n. 16.

gressional interests underlying sections 205(e) and 205(f). The Federal Alcohol Administration Act (FAAA), which became law in 1935 shortly after the repeal of Prohibition, was designed as a comprehensive statute to deal with practices³ within the alcohol beverage industry that Congress had judged to be unfair and deceptive, resulting in harm to both competitors and consumers. When reporting favorably to Congress on the FAAA, the House Ways and Means Committee summarized its conclusions with respect to alcohol content disclosure as follows:

"The variation of alcoholic content has little consumer importance and the industry recognizes that attempts to sell beer and other malt beverages on the basis of alcoholic content are attempts to take advantage of the ignorance of the consumer and the psychology created by prohibition experiences.

"Legitimate members of the industry have suffered seriously from unfair competition resulting from labeling and advertising that uses such terms as 'strong', 'extra strength', 'high test', 'high proof', 'pre-war strength', '14 percent original extract', and from brand names or other statements or references which include conspicuous numerals or symbols intending to suggest that the numerals or symbols represent the alcoholic content. Usually such representations of excess alcoholic content are false, but irrespective of their falsity, their abuse has grown to such an extent since repeal that the prohibition of all such statements is in the interest of the consumer and the promotion of fair competition."

³ In addition to the prohibitions at issue in this case, Congress enacted regulations restricting the use of exclusive outlets, 27 U.S.C. § 205(a), tied houses, § 205(b), and commercial bribery, § 205(c).

Federal Alcohol Administration Act: Hearings Before the Ways and Means Committee, HR8539, 74th Cong., 1st Sess. (1935). The legislation thus stemmed from the belief that withholding alcohol content information would benefit the consumer and promote fair competition within the industry.

Testimony given during Federal Alcohol Control Administration (FACA) hearings⁴ confirms that one of the concerns underlying the movement to prohibit the disclosure of the alcohol content of malt beverages was that such disclosures tended to be misleading and were therefore subject to misuse. Testimony showed that accurate readings of alcohol content were difficult to obtain due to the "very peculiar" conditions of the brewing industry, namely that the malt crops and the atmospheric pressures and temperatures of fermenting cellars varied. Rec., vol. I, doc. 15, at 36-37. Given these problems, the alcohol content of beer could not be accurately measured and disclosed without allowing for a .4-.5 percent error of margin. *Id.* at 38-39. Testimony also suggested that not disclosing the alcohol content of malt beverages would relieve marketplace pressures to produce beer on the basis of alcohol content, resulting over the long term in beers with a lower alcohol content. *Id.* at 33.

⁴ FACA hearings were held just prior to the drafting and adoption of the FAAA on November 1, 1934. Federal Alcohol Regulations were a precursor to the FAAA. The FAAA Senate Report states:

"The bill embodies in statutory form so much of the former code system as the committee now deems appropriate and within the constitutional power of Congress to enact."

S.Rep. No. 1215, 7th Cong., 17 [sic] Sess. 2 (1935). Because the drafters of the FAAA intended to adopt many FACA regulations, these hearings are relevant to congressional intent with respect to the FAAA. The hearings were introduced into evidence in the district court by Coors. See rec., vol. I, doc. 17, at 9 n. 5 (Plaintiff's Response to Motion for Summary Judgment), and rec., vol. I, docs. 15 and 16.

The legislative history reveals congressional concern regarding the effect of "strength wars" on brewers and the consuming public. In the FACA hearings, witnesses testified that statements of alcohol content on malt beverages should be prohibited to avoid this evil. Ralph W. Jackman of the Wisconsin State Brewers Association testified that labels displaying alcohol content resulted in a strength war wherein producers competed for market share by putting increasing amounts of alcohol in their beer. *See id.* at 34-38. Jackman testified that "the legitimate brewer does not desire to sell his beer on the basis of alcohol." *Id.* at 34. He said that brewers were unable to market beer on the basis of taste and flavor, however, because the practice of disclosing the alcohol content of malt beverages generally exerted market pressure on brewers to increase the alcohol content of their own products. *See id.* at 40. Alexander H. Bell, another representative of the brewing industry, echoed Mr. Jackman's testimony:

"I have steadfastly urged that beer be sold as a beverage, with limited alcohol content, not as an intoxicant. That was followed for some little time by one of the local brewers here, till they found that in order to meet the competition it was necessary to increase the alcohol content of the beer to some extent."

Id. at 68. Jackman further testified that competitors in the marketplace would benefit because producing beer with a greater amount of alcohol was more costly. *See id.* at 35. Finally, industry witnesses testified that beer with a lower alcohol content would appease the "drys," who opposed drinking, and thus nondisclosure of alcohol content would benefit the industry as a whole.

The asserted government interest central to this case is the prevention of strength wars among the brewers. Congress believed that, in the long run, the market as regu-

lated by section 205(e) and (f) would produce a lower alcohol beer for the benefit of the industry and the consuming public. The interests outlined above, as asserted, are substantial. It is a reasonable, legitimate legislative interest within Congress' commerce power to regulate the marketing of beer in interstate commerce to ensure fair competition, and to maintain moderate levels of alcohol in beer in order to protect the consumer from the otherwise unchecked "mistakes and excesses" of the brewing industry. *See Opening Brief for the Defendants-Appellants* at 4.⁵

In assessing the strength of the government's interests in withholding the alcohol content of the beers, the district court focused primarily on the validity of the asserted ends given the passage of time and changed circumstances. The court concluded that the factual circumstances that had given rise to the statute in 1935 no longer exist, and consequently, the statute no longer serves a substantial interest. The court first noted that because there are fewer brewers producing a large percentage of the market share, "it's very difficult for the court to see how there is any unfair competition or antitrust aspect to this." *Rec.*, vol. II, at 52.

⁵ Contrary to Coors' contentions, the fact that Congress pursued non-commercial as well as commercial aims in enacting §§ 205(e) and 205(f) does not detract from either the legitimacy or substantiality of Congress' aims. *See infra* at 27. The noncommercial protective aims of this legislation are consistent with the Commerce Clause.

"One permissible and particularly potent form of federal commerce regulation is the imposition of *protective conditions* on the privilege of engaging in activity that affects interstate commerce. . . . [T]he Supreme Court has consistently upheld congressional use of protective conditions to combat activities largely disfavored for largely noncommercial reasons."

Laurence Tribe, *Constitutional Law* § 5-6 at 311-12 (2d ed. 1988).

It is irrelevant that the circumstances giving rise to a particular piece of legislation have changed so long as the legislation continues to serve some valid and substantial government interest. See *Bolger v. Young Drug Prods.*, 463 U.S. 60, 71, 103 S.Ct. 2875, 2883, 77 L.Ed.2d 469 (1983); *Ohrlik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460, 98 S.Ct. 1912, 1920-12, 56 L.Ed.2d 444 (1978). The fact that the malt beverage industry and market have changed does not compel the conclusion that strength wars are no longer a real danger to the consuming public as well as to the brewers. The government argues that, in spite of changed circumstances, there is a continuing danger of strength wars similar to those that existed in 1935, as evidenced by Coors' advertising campaign, current market conditions, and consumer demand. See Opening Brief of Defendants-Appellants at 17-18. Coors' admission at oral argument that it desires to publish the alcohol content of its products to dispel Coors' image of being a "weak" beer testifies to the viability of the government's interest. See Testimony of Oral Argument. Nov. 6, 1990 (on file with Clerk of Court for Tenth Circuit). The House argues that the statute has continuing validity given that the emerging trend in the beer industry toward many small breweries may precipitate the strength war problems associated with the marketplace of 1935. Opening Brief of Intervenor-Defendants at 24 n. 51. Similarly, the government still asserts its interest in protecting the public against the "excesses" of the brewing industry. Opening Brief for Defendants-Appellants at 4, 22. Given all of these circumstances, it is apparent that the government has *asserted* a legitimate and substantial interest supporting the continuing validity of the legislation at issue.

C.

We next assess whether the regulation at issue "directly advances" the government's asserted interest. See *Central Hudson*, 447 U.S. at 566, 100 S.Ct. at 2351. Whether legislation "directly advances" the government's end requires us to focus on the relationship between the government's interest and the prohibition on speech. *Id.* at 569, 100 S.Ct. at 2353. There must be an "immediate connection" between the prohibition and the government's asserted end. *Id.* If the means-end connection is "tenuous" or "highly speculative", the regulation cannot survive constitutional scrutiny. *Id.*

We begin our analysis by noting that the record here does not unambiguously reflect a correct legislative judgment that the enacted means directly advance the intended ends. Unlike a number of cases in the commercial speech area, the link between advertising and strength wars is not self-evident. See, e.g., *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 341-42, 106 S.Ct. 2968, 2976-77, 92 L.Ed.2d 266 (1986) (link between ban on gambling advertising and level of gambling self-evident); *Central Hudson*, 447 U.S. at 566, 100 S.Ct. at 2353 (link between advertising ban and sales self-evident); *Dunagin v. City of Oxford*, 718 F.2d 738, 747-49 & n. 8 (5th Cir. 1983) (link between advertising and increased alcohol use deemed self-evident; separate analysis of means-end connection therefore not conducted), *cert. denied*, 467 U.S. 1259, 104 S.Ct. 3553, 82 L.Ed.2d 855 (1984). In addition, this is not a case where we can defer to the legislature on the basis of precedent which already has established that the legislature's chosen means directly advances the asserted ends. See, e.g., *Metromedia v. City of San Diego*, 453 U.S. 490, 509 n. 14, 101 S.Ct. 2882, 2893 n. 14, 69 L.Ed.2d 800 (1981) (plurality relied on established line

of cases to ratify legislature's judgment that banning commercial billboards would improve traffic safety). On the other hand, we cannot agree with the district court that, as a matter of law, the government's asserted end is *not* directly advanced by the promotion on advertising the alcohol content of beer.

The party urging the prohibition on speech has the burden of justifying such a restriction. See *Board of Trustees v. Fox*, 492 U.S. 469, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) (*Fox III*). In *Fox v. Board of Trustees*, 841 F.2d 1207, 1213 (2d Cir. 1988) (*Fox II*), the Second Circuit considered whether a prohibition placed on corporations conducting product demonstrations in campus dormitories directly advanced the University's interest in prevention of crime, protection against consumer exploitation, preservation of residential tranquility, and the promotion of education. The court of appeals concluded that the district court erred in assessing whether the legislation directly advanced the asserted governmental interests because it had only considered whether the legislative means were reasonably related to the legislative ends. *Id.* The appellate court rejected the district court's deferential review, stating:

"The burden . . . shifts to the state not merely to assert that it has a substantial interest *but to demonstrate that interest by real evidence.* . . .

"It is less clear, however, that the Regulation directly advances the State's interests; the Regulation cannot be sustained if it only provides 'ineffective or remote support for the government's purpose.' *Central Hudson*, 447 U.S. at 564, 100 S.Ct. at 2350. . . . *Whether SUNY offered sufficient evidence to meet its burden* is not evident as the district court considered only whether the Regulation was reasonably related to the asserted governmental interests, not whether it directly advanced them."

Id. (emphasis added).

In reviewing the Second Circuit's decision in *Fox II*, the Supreme Court held:

"The Court of Appeals did not decide, however, whether Resolution 66-156 directly advances these interests, and whether the regulation it imposes is more extensive than is necessary for that purpose. . . . *We think that remand was correct, since further factual findings had to be made.*"

Fox III, 492 U.S. at 475-76, 109 S.Ct. at 3032-33 (emphasis added). The Supreme Court reversed the Second Circuit's decision with respect to the terms of the appellate court's remand order detailing how the "more extensive than necessary prong" of the analysis should be applied, but the Court did not further comment on the terms of the remand with respect to the "directly advance" prong. This tacit approval of the Second Circuit's approach to whether the legislative means "direct advance" the legislative ends comports with the Supreme Court's statement in *Fox III* that "the State bears the burden of justifying its restrictions." *Id.* at 480, 109 S.Ct. at 3034-35; see also *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 95-96, 97 S.Ct. 1614, 1619-20, 52 L.Ed.2d 155 (1977) (record evidence required to establish nexus between legislative ends and means); cf. *Dunagin*, 718 F.2d at 748 n. 8 (noting that particularized findings of fact should play a limited role in determining the constitutionality of any given statute).

Requiring the government to affirmatively demonstrate a nexus between its legislative means and ends may appear an undue judicial intrusion on the legislative function. *Fox III*, 492 U.S. at 478-81, 109 S.Ct. at 3033-35 (deference should be accorded governmental decision-makers). Nonetheless, the "directly advance" prong of the *Central Hudson* analysis compels a reviewing court to assess

whether the legislative ends are served by the legislative means: a determination that the legislature presumably made in enacting the legislation at issue. Therefore, we cannot simply assume that particular means will accomplish certain ends because the legislature presumed they would and enacted them into law.

In this case, Congress chose to regulate alcohol content disclosure in order to remove the pressure to produce malt beverages with ever-increasing alcohol content. Coors introduced, and the district court considered, evidence that the legislation as enacted now provides only "ineffective or remote support for the government's purpose." *Central Hudson*, 447 U.S. at 564, 100 S.Ct. at 2350; see, e.g., rec., vol. II, at 22-24 and 29. In assessing whether the prohibition at issue directly advanced the government's ends, the district court did not have the benefit of *Fox III*. The court first looked at the issue in conjunction with whether Congress was pursuing a substantial end. See rec., vol. II, at 51-52. It then indicated it would merge its consideration of "directly advance" with its "less restrictive means" analysis:

"Whether the governmental interest is directly advanced by the statute is an interesting question, because we still have the ability of the Bureau, BATF, to regulate, if this statute is declared unconstitutional, in violation of the First Amendment. We still have the opportunity for regulation to make sure that there is no misleading type of information given."

Id. at 53-54. As a consequence, the district court did not separately consider whether the facts presented by both sides presented a genuine issue of material fact on whether the legislative means *directly advanced* the legislative ends. The record before us demonstrates that there is a question of material fact. Summary judgment in favor of Coors was thus inappropriate.

D.

If the district court determines on remand that Congress' substantial interest in controlling strength wars among breweries is directly advanced by the regulation of alcohol-content advertising, it must then assess whether the absolute prohibition of such advertising is more extensive than necessary to serve the government's interest. Subsequent to the district court's decision in this case, the Supreme Court formulated a standard for the "no more extensive than necessary" element of the *Central Hudson* analysis:

"What our decisions require is a 'fit' between the legislature's ends and the means chosen to accomplish those ends,'—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served,' that employs *not necessarily the least restrictive means but*, as we have put it in the other contexts discussed above, *a means narrowly tailored to achieve the desired objective.* . . .

"We reject the contention that the test we have described is overly permissive. It is far different, of course, from the 'rational basis' test used for Fourteenth Amendment equal protection analysis. There it suffices if the law could be thought to further a legitimate governmental goal, without reference to whether it does so at inordinate cost. Here we *require the government goal to be substantial, and the cost to be carefully calculated.*"

Fox III, 492 U.S. at 480, 109 S.Ct. at 3034-35 (citations omitted) (emphasis added). The Court placed the burden firmly on the government to demonstrate that restrictions were in proportion to the interest served: "Moreover, since the State bears the burden of justifying its restrictions, it

must affirmatively establish the reasonable fit we require." *Id.* (citation omitted).

The district court here concluded that the absolute prohibition of alcohol content advertising does not satisfy the fourth prong of the *Central Hudson* test because "there [could] be a much less extensive regulation carefully drawn to achieve the objectives that are argued for by the defendant intervenor in this case other than the flat prohibition." Rec., vol. II, at 54. Rendering its decision without the benefit of the precedent established by *Fox III*, the district court misperceived the nature of the "no more extensive than necessary" analysis. For a regulation of speech to pass constitutional muster, it need not be demonstrated that the government chose the least restrictive means; rather, the governmental goal must be "substantial" and the cost "carefully calculated." *Fox III*, 492 U.S. at 480, 109 S.Ct. at 3034-35. The Court in *Fox III* emphasized the limits of judicial review in this respect and the necessity of deferring to the legislature's judgment as to what "reasonable" means best effectuate the governmental end: "[W]e leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Id.* In addition, the Court stated that it chose not to adopt a least-restrictive-means requirement in order to "provide the Legislative and Executive Branches needed leeway in a field (commercial speech) 'traditionally subject to governmental regulation.'" *Id.* at 481, 109 S.Ct. at 3035 (quoting *Ohralik*, 436 U.S. at 455-56, 98 S.Ct. at 1918-19).

As discussed above, the government has asserted a substantial interest in preventing strength wars for the benefit of both consumers and producers. The possibility of less extensive means of regulation does not require the conclusion that the chosen means are impermissible. The legislative history here demonstrates that the legislature reasonably could have concluded that strength wars and

their attendant dangers could be eliminated by prohibiting alcohol content disclosure. See *Fox III*, 492 U.S. at 480, 109 S.Ct. at 3034-35; *San Francisco Arts & Athletics Inc. v. United States Olympic Comm.*, 483 U.S. 522, 539, 107 S.Ct. 2971, 2982, 97 L.Ed.2d 427 (1987); *Posadas de Puerto Rico Assocs.*, 478 U.S. at 344, 106 S.Ct. at 2978; cf. *Capital Broadcasting Co. v. Mitchell*, 333 F.Supp. 582, 585 (D.C.Cir. 1971) (three-judge court) ("Congress had convincing evidence that the Labeling Act of 1965 had not materially reduced the incidence of smoking"), *aff'd sub nom. Capital Broadcasting Co. v. Acting Attorney General*, 405 U.S. 1000, 92 S.Ct. 1289, 31 L.Ed.2d 472 (1972); *Dunagin*, 718 F.2d at 751 ("We do not believe that a less restrictive time, place and manner restriction, such as a disclaimer warning of the dangers of alcohol, would be effective. The state's concern is not that the public is unaware of the dangers of alcohol. . . . The concern instead is that advertising will unduly promote alcohol consumption despite known dangers").

The district court apparently concluded that the legislation currently fails the more-restrictive-than-necessary analysis because it represents an incorrect balance between the consumers' interest in having complete disclosure and the government's interest in preventing strength wars. See rec., vol. II, at 52-53. The court reasoned that because the government has a relatively insubstantial interest in preventing strength wars when compared to the consumers' countervailing interest in disclosure, the statute is unconstitutional. *Id.* Relevant case law suggests that a court may evaluate the competing interests in this manner to conclude that, as a constitutional matter, the ends cannot justify the scope of the regulation at issue. Thus, in *Fox III*, the Court stated that the scope of a regulation must be "in proportion to the interest served." 492 U.S. at 480, 109 S.Ct. at 3034-35 (citation omitted). In *Bolger*, 463

U.S. at 75, 103 S.Ct. at 2885, the court struck down a statute prohibiting the mailing of condom advertisements because the asserted interest of shielding recipients from offensive materials was insufficient to justify the suppression of speech. With respect to the governmental interest articulated in *Bolger*, the Court concluded:

"Because the proscribed information 'may bear on one of the most important decisions' parents have a right to make, the restriction of 'the free flow of truthful information' constitutes a 'basic' constitutional defect regardless of the strength of the government's interest."

Id. at 75, 103 S.Ct. at 2885 (citation omitted). Similarly, in *Linmark Associates*, the Court concluded that the interest in ensuring racial integration could not, as a constitutional matter, justify the suppression of "for sale" signs on homes because the suppression weighed unfavorably against "one of the most important decisions [people] have a right to make: where to live and raise their families." 431 U.S. at 96, 97 S.Ct. at 1620.

However, neither relevant precedent nor the record in this case require the conclusion that the public's interest in information relating to alcohol content so outweighs the government's interest in nondisclosure as to render the statute unconstitutional. We have held that legislation prohibiting alcohol advertisements promotes a substantial interest in health and welfare, which otherwise would be adversely affected by alcohol consumption. *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, 498 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cables, Inc. v. Crisp*, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984). Similarly, in *Dunagin*, 718 F.2d at 747, the Fifth Circuit upheld a statute that significantly restricted liquor advertising by local media as a legitimate

way to avoid the undue promotion of alcohol consumption, in the interest of the public welfare.

Coors notes that the balance struck in favor of non-disclosure in *Oklahoma Telecasters* and *Dunagin* was altered by the fact the state legislatures had promulgated the statutes at issue pursuant to the authority granted them under the Twenty-first Amendment. Coors argues that because the regulation in this case was promulgated by Congress, the balance of interests weigh in favor of disclosure. Thus, in *Oklahoma Telecasters*, we stated that "when the Twenty-first Amendment is considered in addition to Oklahoma's substantial interest under its police power, the balance shifts in the state's favor, permitting regulation of commercial speech *that might otherwise not be permissible*." 699 F.2d at 502 (emphasis added). In *Dunagin*, the Fifth Circuit upheld the validity of the advertising regulation noting that precedent establishing the state's special interest in regulating alcohol "help[ed] establish the balance in favor of the state." 718 F.2d at 750.

Oklahoma Telecasters does not require us to conclude that the federal government has no constitutional basis to substantiate its interest, or that the federal government's interest in regulating alcohol content disclosure is insufficient to justify a restraint on speech.⁶ The Twenty-first Amendment did not completely abrogate Congressional power to regulate under the Commerce Clause. *See Arrow*

⁶ As demonstrated by the regulation itself, which is effective only if not contradicted by state law, Congress may have a less compelling interest than state legislatures in the labeling and advertising of the alcohol content of malt beverages. *See* 27 U.S.C. §§ 205(e) and 205(f). Because the statute at issue expressly states that alcohol content may not be disclosed unless required by state law, we need not address whether the holdings in *Oklahoma Telecasters* and *Dunagin* demonstrate that Congress has attempted to trump those powers expressly granted to the states by the Twenty-first Amendment.

Distilleries, Inc. v. Alexander, 109 F.2d 397 (7th Cir.) (FAAA not unconstitutional on ground that Twenty-first Amendment deprived Congress of power to enact interstate alcohol regulation), *cert. denied*, 310 U.S. 646, 60 S.Ct. 1095, 84 L.Ed. 1412 (1940); *see also South Dakota v. Dole*, 483 U.S. 203, 209, 107 S.Ct. 2793, 2797, 97 L.Ed.2d 171 (1987) (Twenty-first Amendment does not preclude Congress from indirectly establishing minimum drinking age by exercising its spending power); *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (Twenty-first Amendment not *pro tanto* repeal of Commerce Clause, but merely requires that each provision "be considered in the light of the other, and in the context of the issues at stake in any concrete case"); *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 297-99, 65 S.Ct. 661, 663-65, 89 L.Ed. 951 (1945) (federal anti-trust prosecution of alcohol producers and distributors consistent with Twenty-first Amendment). We conclude that Congress has sufficient residual authority to regulate the marketplace for the benefit of consumers and producers under the Commerce Clause even though it may result in indirect regulation of alcohol. *See id.* Like the state legislatures in *Oklahoma Telecasters* and *Dunagin*, therefore, Congress may constitutionally regulate alcohol advertisements.

Coors makes a similar argument with respect to the decision rendered in *Posadas*. There, the Supreme Court stated that the advertising ban was permissible as "the greater power [of the state] to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." 478 U.S. at 345-46, 106 S.Ct. at 2979. The Court did not state that the greater power to ban gambling was *necessary* to ban gambling advertising. The Court relied on the fact that Puerto Rico had the greater power to ban gambling to distinguish

Posadas from those cases that struck down regulations restricting information pertaining to constitutionally protected conduct.⁷ *Id.* The Court also stated that finding Puerto Rico possessed the power to ban gambling advertisements was necessary to avoid the anomalous result of concluding that Puerto Rico had the police power to make gambling illegal but not to prohibit the advertising of gambling. *Id.* Consequently, Congress need not possess the greater power to completely regulate alcohol sales, a power expressly reserved to the states under the Twenty-first Amendment, in order to reconcile *Posadas* with the holding in this case that Congress can regulate alcohol advertisements consistent with the First Amendment.

III.

In sum, we hold that Coors' proposal to advertise the alcohol content of beer is commercial speech protected by the First Amendment, and that the public's interests in disclosure are significant. We also hold that the interests asserted by Congress and demonstrated in the legislative history are legitimate and substantial. We conclude that there are genuine issues of material fact underlying the question of whether the federal regulation of alcohol content advertising directly advances the government's asserted interest in preventing strength wars, and whether the complete prohibition of such advertising results in a "reasonable fit" between the legislature's goal and the means chosen to reach it, within the meaning of *Fox III*.

The district court judgment in favor of Coors is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

⁷ We note that the sale and consumption of alcohol are not constitutionally protected activities and can be prohibited.

APPENDIX C

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-Z-977

ADOLPH COORS COMPANY, PLAINTIFF

vs.

NICHOLAS BRADY, ET AL., DEFENDANTS

REPORTER'S TRANSCRIPT
(Trial to Court: Bench Ruling)

Proceedings before the HONORABLE ZITZ L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 11:00 a.m., on the 28th day of October, 1992, in Courtroom C-502, United States Courthouse, Denver, Colorado.

APPEARANCES

BRADLEY, CAMPBELL, CARNEY & MADSEN, by K. PRESTON OADE, JR., 1717 Washington Avenue, Golden, Colorado, 80401, appearing for the plaintiff.

PATRICIA M. RUSSOTTO and ROBIN S. ROSENBAUM, Attorneys at Law, U.S. Department of Justice, Civil Division, 901 E Street, N.W., Room 912, Washington, D.C., 20530, appearing for the defendants.

[2] (The following proceedings were had and entered of record after the presentation of evidence and the arguments of counsel:)

THE COURTROOM DEPUTY: The matter now before the Court is Adolph Coors Company vs. Nicholas Brady, et al., Civil Action No. 87-Z-977.

THE COURT: Good afternoon.

Well, the first thing I would like to do is to thank the attorneys for a very well presented case, for your cooperation. There have been a few little glitches in that; but basically there has been good cooperation, and I appreciate it.

It's been most interesting. My conclusions today—my findings and conclusions, I propose to read into the record. I have taken to heart what you said about actually doing a written opinion and publishing, and I probably will do that within the next few weeks. But the opinion today will be in effect. And the published opinion will pretty much follow along what I am saying. It may expand a little bit and cite a few more cases.

We start with the Tenth Circuit opinion and in reversing the last decision that this court made, pointing the error of my ways to me, although I believe that *Fox III* had not been decided at the time that I made the last decision; but we do have the law clearly presented through the case *Fox III* that [3] has been referred to at length and the Tenth Circuit opinion.

The Tenth Circuit has told us that Coors' proposal to advertise alcoholic content is commercial speech and is protected by the First Amendment. They have also told us that the public interest in disclosure of alcoholic content is significant.

Now, in addition, the Tenth Circuit has concluded that there is some significant and legitimate and substantial interest by Congress in preventing strength wars; and this

has been demonstrated, they indicate, by the legislative history of Congress. So those are givens.

The issues that the circuit court has asked us to consider at this hearing are the following; and I'm reading now from page 1554 of the Tenth Circuit opinion. It's 944 F.2d 1543, *Adolph Coors Company v. Brady*, at page 1554:

"The question is whether the federal regulation of alcohol content directly advances the Government's asserted interest in preventing strength wars. A second question is whether the complete prohibition of such advertising results in a 'reasonable fit' between the legislature's goal and the means chosen to reach it within the meaning of *Fox III*."

Perhaps I should put on the record the cite of *Fox III*; *Board of Trustees v. Fox*, 492 United States 469, 1989 case.

Defendant's attorney argues that Congress makes the law. I couldn't agree more. Congress makes the law. But we [4] know from *Fox III* that a party who is urging prohibited—urging that commercial speech be prohibited has a burden of justifying it.

Now, the evidence in this case concerning strength wars relating to malt liquor is substantial and convinces this court that as to 27 United States Code 205 paragraph (f), which relates to advertising and which indicates that the prohibition is in the form of an exception which says that "except statements of or statements likely to be considered as statements of alcoholic content of malt beverages and wines are prohibited in advertising"—as to that statute, I am satisfied and convinced that the defendant has met its burden. The prohibition of advertising does advance the Government's legitimate interest in—as to strength wars and as to preventing strength wars. And I don't think that the plaintiff is in real dispute with this position.

Plaintiff agrees that ATF must regulate statements of alcoholic content in connection with advertising. Plaintiff also tells us in argument that Coors has no intention of marketing products based on alcoholic strength and is not asking for this. And I agree after hearing the evidence in this case that attempts to market alcoholic content as a product attribute are not legitimate attempts. They are contrary to substantial congressional policy.

Therefore, the Court determines after listening to the [5] evidence and the arguments of counsel that the statement in 27 United States Code section 205(f)(2) meets the test set forth in *Fox III* and in the Tenth Circuit opinion.

And this brings us to the more difficult question of whether the exception in the preceding subparagraph, 27 United States Code 205(e)(2), meets the test. The conclusion that I reach after carefully considering the testimony I've heard and the depositions that I've read is that it does not for this reason: No evidence that I have heard has convinced me that placing the alcoholic content on the can or other container will directly advance the Government's interest in preventing strength wars.

Now, the Tenth Circuit in their opinion spoke in terms of advertising; but it is important to note that subsection (e) refers to labeling. The content of alcohol on the can is not really advertising as we generally think of it, although in closing argument yesterday, Mr. Oade talked about whether a picture of a can, for example, of Coors beer with an alcoholic content listed on it could be advertised in the media, or would it have to sit down on a bed of flowers with the flowers or the decoration covering the alcoholic content.

I don't think I really have to decide that specific issue. I prefer to think of the issue that has been presented, and that appears to me to be clearly an issue for decision as a difference between the labeling of the alcoholic content on

the [6] container and the advertising of alcoholic content as an attribute of the beer and marketing it in that way.

So the two statutes that are before us actually spell out—one says “labeling” as a heading, the other says “advertising.” The advertising one, as we’ve just discussed, stands. The labeling statute, from the evidence I’ve heard, does not meet the test. So even though the Tenth Circuit is talking in terms of advertising or uses the word “advertising,” I’m going to consider that as meaning advertising and labeling.

Prohibiting the alcoholic content disclosure of malt beverages on labels has little, if anything, to do with the type of advertising that promotes strength wars. That is the conclusion I reach from listening to the testimony and reading the depositions.

In Canada, where alcoholic content is listed on the cans, there is no evidence of price (sic) wars; and although Defendant urges that because the beer in Canada may be slightly stronger in alcoholic content than the average beer in the United States that some inference should be drawn from this or raised, I disagree. First of all, it’s a very small percentage; and there may be many other factors to account for why Canadians like their beer slightly stronger than Americans like their beer.

The question raised by the Tenth Circuit again is whether the regulation of speech passes constitutional muster, [7] or to use their language on page 1552 of their decision, “For regulation of speech to pass constitutional muster, it need not be demonstrated that the Government chose the least restrictive means; rather, the government goal must be substantial and the cost carefully calculated.”

Now, the goal may be substantial in this case; but whether the means to that goal prohibiting the listing of the alcoholic content on a can or a bottle is necessary for the goal, whether the cost has been sufficiently calculated

in that prohibition, is what concerns the Court. The evidence that I have heard in this case does not show me that there is any real connection with this. The testimony of Mr. Gundee, for example, in talking about the survey in Canada, indicates that Canadians—more Canadians know the alcoholic content of the beer that they’re drinking than American citizens, or the American beer drinkers. Canada of course, does allow content on labels.

The result of the goal—of the poll is that citizens, both in Canada and in the United States, drinkers, want to know the alcoholic content. They want the information; and the indication is they want it not to drink higher-alcohol beer but to be more responsible and for many to reduce the alcoholic content of what they’re drinking. The testimony that I have heard has indicated to me that there is a trend, not a trend towards the malt liquors, which are the high end of the alcohol, but a trend towards the light beers, which are the low end. [8] And there are significant reasons why beer drinkers are interested in light beers, low calories, moderation, so that they can have perhaps a couple beers before they—with dinner, perhaps, before they step into a car and subject themselves to the laws of the various states relating to driving under the influence or driving while ability impaired. It’s extremely important that they be able to know the content of what they’re drinking. People do want this information. They want it to be responsible people, drinkers, the evidence has shown. They do not just want it to try to drink stronger beers.

The evidence shows that the high-strength brews do not have the same popular appeal as the low-strength and the light beers, either abroad or in the United States; and I refer to the depositions both of Mr. Ambler and Mr. Nelson.

In the deposition of Mr. Black, who has been with ATF many years, he indicates that he supports disclosure of alcoholic content. He would not be opposed to a change in the statute as long as ATF could regulate the advertising. And I think that's really the key. As long as the advertising does not promote "Buy a beer because it's stronger," quote/unquote, as long as ATF has a hand in the advertising, there is little danger of strength wars.

Basically, I could go through the testimony of all the witnesses I've heard, from Mr. Cates all the way through to Mr. Rechholtz, and none of the witnesses, none of the depositions [9] that I have read, no credible evidence that I have heard, lead me to believe that giving alcoholic content on labels will in any way promote strength—alcoholic strength wars, as long as ATF has the authority to regulate the use of this content in advertising.

And therefore, the Court concludes that subparagraph (e)—and we're again for the record talking about 27 U.S.C. section 205(e)(2) and the exception therein—does not make a reasonable fit, does not advance the government interest, and is an unconstitutional restraint on commercial speech.

Those regulations which pertain to (e) fall with the statute. Plaintiff has mentioned some of them, and I don't intend to, because I think by indicating that section (e) does not meet constitutional muster, the regulations that pertain to (e) fall by the way, although I strongly urge ATF—and I'm sure that Counsel will communicate this—to draft new regulations as soon as possible and as necessary to make sure that advertising is controlled, if this case is not going to be appealed, in any case. If it's not going to be appealed, I think we need the new regs right away.

I would also hope that Counsel could urge ATF to consider some uniform way of considering alcoholic content. I know we have heard testimony of percentage by weight,

percentage by volume; and it is confusing. It may be that because Canada and the other countries measure percentage by [10] volume, it may make sense for that to be a uniform way of measuring the alcoholic content of malt beverages in this country.

The Court intends to reduce these short remarks on the record to an opinion. We will publish it. It's going to be up to the defendant and perhaps in consultation not only with ATF but with Congress to decide whether in view of this decision, which is much more limited than my previous decision—whether there will or will not be an appeal. If there will be an appeal, I strongly urge cooperation on the appeal with both counsel, with all counsel.

And we are going to be turning back to both sides all exhibits that have been admitted, because we have no room to store them. And each attorney is going to have to keep in his or her possession the exhibits for the Tenth Circuit, especially if you are going to have an appeal. And the exhibits, for example, which were not admitted, although I think we ended up admitting almost all exhibits. And the depositions, as soon as I take all my sticky—stickies off of them—we'll give those back to you, too.

Now, any questions? Anything that you feel should be on the record as proposed findings or decisions?

MR. OADE: Your Honor, we would simply ask that the Court enter a permanent injunction against the defendants from enforcing these statutory provisions and the implementing [11] regulations and that that injunction be entered forthwith.

THE COURT: You're probably going to want some sort of a stay on that so that you can at least consider with your clients whether you need to appeal or not.

MS. RUSSOTTO: I believe there is an automatic ten-day stay in any event; but yes, we will certainly be considering whether or not we will be seeking a stay. I obviously

can't make any commitment in that regard at this point, but we will certainly be considering that over the next ten days.

THE COURT: How many days?

MS. RUSSOTTO: The next ten days. I believe the rule—the rule of civil procedure—I don't recall exactly which one it is now—mentions—

THE COURT: Well, you have 30 days to appeal.

MS. RUSSOTTO: I realize that, your Honor.

I think we have 60 days actually to appeal.

THE COURT: Pardon?

MS. RUSSOTTO: I think we have 60 days actually to appeal.

THE COURT: Oh, you're the Government. That's right.

MS. RUSSOTTO: In any event, we will be making a decision rather quickly whether or not to seek a stay.

THE COURT: All right. Today is the 28th of October and the Government—the defendant is asking for ten days to [12] consider this before any injunction go into effect. And I think that's reasonable, Mr. Oade. Your clients have waited a while; they can wait just a little longer.

How about the 9th? The Court will order that a permanent injunction against enforcing subsection (e) of 27 U.S.C. 205, or the exception therein—now, I'm not declaring the whole—Everyone understands that we're not talking about section (e) being unconstitutional. We're simply talking about the specific language, which is “except that statements of or statements likely to be considered as statements of alcoholic content of malt beverages are prohibited unless required by state law.” And that's the end of it. I think that's the only language—that's the only language that I'm prohibiting.

MR. OADE: We understand that, your Honor; and I think the record is also clear that the implementing regu-

lations that use words like “strong” or “extra strength”—we don't challenge those, either.

THE COURT: That's my understanding.

MR. OADE: The record is very clear on the scope of the relief sought in this case.

THE COURT: Those implementing regulations that you're mentioning are actually implementing regulations to the exception in (f), the advertising side, which I am not touching.

MR. OADE: We understand that, your Honor.

THE COURT: All right. The permanent injunction, then, [13] will go into effect on November 9, unless I hear something more by stipulation of the parties or unless there is something that is ordered in this case.

MS. RUSSOTTO: Very well.

THE COURT: Anything else that we need to put on the record?

MS. RUSSOTTO: We have no further remarks to make on the record, your Honor.

MR. OADE: We have nothing further, your Honor, except to thank the Court for your hard work and for reading all of those depositions.

THE COURT: There were a lot; and I didn't know I was going to be in trial as much, so it took a while. Let me also indicate, I think there is room here for some real discussion on whether this truly makes sense, because I sincerely feel that this is a solution that makes sense to everybody, including ATF. And rather than just appeal it for the purpose of appealing it, please talk together, think long and hard about it, because the First Amendment is important. And I think this perhaps takes care of the real problem which you sincerely have presented to the Court.

Okay. Thank you, and the Court is in recess.

(Thereupon, the trial was concluded and the Court recessed at 11:30 a.m.)

* * * * *

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated at Denver, Colorado, this 28th day of October, 1992.

Paul A. Zuckerman

APPENDIX D

[I] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 87-Z-977

ADOLPH COORS COMPANY, PLAINTIFF

vs.

JAMES BAKER, ET AL., DEFENDANTS

AND

SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE
UNITED STATES HOUSE OF REPRESENTATIVES,
INTERVENOR-DEFENDANTS

REPORTER'S TRANSCRIPT

(Hearing on Cross-Motions for Summary Judgment)

Proceedings before the HONORABLE ZITZ L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 8:50 a.m., on the 31st day of May, 1989, in Courtroom C-204, United States Courthouse, Denver, Colorado.

APPEARANCES

BRADLEY, CAMPBELL, CARNEY & MADSEN, by K. PRESTON OADE, Attorney at Law, 171 Washington Avenue, Golden, Colorado, 80401-1994, appearing for the plaintiff.

MICHAEL J. NORTON, Acting United States Attorney, by

* * * * *

RULING

THE COURT: The briefing and the arguments today have pinpointed what is a very interesting issue, and that is the constitutionality based on a First Amendment challenge to two [47] small parts of a statute, very specifically the exception clauses within the parentheses of 27 United States Code 205(e)(2) and 205(f)(2). And we're not talking, as I understand, about the whole of (e) and (f) or even (e)(2) or (f)(2), but rather just the parenthetical clause within those two subsections, which state, reading from the one in (e)(2), ". . . except that statements of or

statements likely to be considered as statements of alcoholic content of malt beverages are prohibited unless required by state law and except that—"whoops. We're talking about wines. So we're not even talking about the whole exception clause. We're only talking about that part of the exception clause that refers to malt beverages, not the part that refers to wines.

And let me just take a look at—Under (f)(2), the exception clause ". . . except the statements of or statements likely to be considered of alcoholic content of malt beverages and wines"; and in this case, we're concerned only with malt beverages. So what we're talking about is whether that prohibition on limiting alcoholic content of malt beverages contained within those two parenthetical exceptions to 27 U.S.C. 205(e)(2) and (f)(2) can stand constitutional muster.

This case arose because Plaintiff, Adolph Coors Company, desired certain advertising or packaging on their product and went to the Bureau of Alcohol, Tobacco, and Firearms, BATF, for approval. BATF refused approval because of [48] the statute in question, however agreed with the plaintiff that the statutory prohibition against listing any alcoholic content of beer was unconstitutional.

We then had the intervenor defendant step into the case to create a case or controversy. The intervenor defendant is the Speaker and Bipartisan Leadership Group of the U.S. House of Representatives, representing the leadership of the House and I presume the House of Representatives—

MS. JARUZELSKI: Yes, that's our institutional mechanism.

THE COURT: —through the leadership.

This intervenor defendant has made a very forceful argument that the Court should not interfere with a statute, even a statute passed by Congress 50-odd years

ago, and declare it unconstitutional unless the ruling was compelling. And basically, the argument has been made very forcefully by Defendant that the Court should not interfere with the legislative decisions made by Congress. However, if a statute is in violation of the First Amendment, whether it be a Federal statute or state statute, the only way that that ruling can be made is by the judicial branch, by the court, unless Congress itself chooses to amend or to repeal the statute, which Congress has not done in this case.

The pivotal case, the important case for decision of whether a statute violates the First Amendment protections [49] concerning commercial speech is *Central Hudson Gas & Electric v. Public Service Commission*, which is 447 U.S. 557, a 1980 Supreme Court decision. In that decision, the Supreme Court said the following, and I'm reading now from page 566 of the decision:

"In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted and whether it is not more extensive than is necessary to serve that interest."

And thus, in 1980, the Supreme Court set forth the landmark case in the commercial speech area which establishes this four-part test and requires a court to do a balancing test, to consider the factors that are set forth by the Supreme Court.

First factor: Does the commercial message accurately inform the public about lawful activity in a manner that is

not misleading, or as stated by the Supreme Court, does it concern lawful activity and is not misleading?

I've listened carefully to the arguments of Counsel; and it appears to the Court that the argument stated by the — or [50] stated in the amicus brief has some merit. What is misleading, it appears to the Court, is the status quo, rather than a truthful statement about alcoholic content. It is very difficult for this court to see how a truthful statement can be misleading. Mere disclosure of the alcoholic content cannot be deceptive almost by definition.

I think what is being argued by Intervenor Defendant is that the manner of the disclosure can be deceptive, but the manner of disclosure of the alcoholic content certainly is subject to appropriate regulations which can prevent misleading information or prevent false impressions that people can drink more or that insignificant percentages are significant.

The legislative hearings that have been discussed in argument were hearings that took place in the 30's, approximately a year after Prohibition was ended; and the conditions in the 1930's, a short period after prohibition, is certainly not the condition of the present time, the 1980's:

We have — we have modern brewing technologies — This has been pointed out, and I think there is no dispute over this — in the present day, where the percentage can be very clearly pinpointed. In the 1930's, there were 680-some brewers. Today, 90 percent of the malt liquor is made by 5 breweries; and we have other very substantial differences between the 30's and the 80's, the late 80's, because today with the importance of automobiles and the desire of drivers to be responsible [51] drinkers and to know how much alcohol they are drinking, there is certainly a very strong reason for making information available so that

citizens will be able to judge how much alcoholic intake they have, if they're going to be driving a car.

I would note that the point made in the amicus brief is compelling that the differences between having some light beer, for example, with little alcoholic content, and malt liquor, with heavy alcoholic content, might make all the difference between a driver being not at all affected by a social drink and a driver being unable to operate a vehicle. And this is a very powerful and persuasive reason why the status quo of not allowing consumers to know the alcoholic content is what is misleading, rather than a truthful statement.

In looking at the first prong, then, of the *Hudson* test, there certainly would be—it certainly would be lawful activity to advise the consumer about alcoholic content in beverages, malt beverages; and it certainly would not be misleading simply to list the alcoholic content.

I would just simply note that alcoholic content is listed as far as wines are concerned and at least by proof in hard liquor.

We then go to the second test of *Central Hudson*, and that is whether the asserted government interest is substantial. And perhaps that should be considered with the third test, [52] which is whether the regulation or in this case, the statute, directly advances the governmental interest.

Do we have a substantial governmental interest in preventing consumers from knowing the alcoholic content? And it appears to the court that the answer has to be no. It's very difficult for the Court to see how there is any unfair competition or antitrust aspect to this. We do not have the same fair competition problems that existed in the 30's; and of course, this court must look to the present time and the present situation in looking at these tests in *Hudson*.

Under the present situation, with fewer brewers producing a large percentage of the market, we certainly don't have the same situation as the 1930 situation of 680-plus brewers brewing beers in small factories, and so forth. Fair competition, I have to agree with the plaintiff, is really not an interest.

Consumer deception? I've already mentioned this on the first prong; and it appears to me that in the 80's, we have knowledgeable consumers, we have consumers who have an interest in knowing alcoholic content, not just because of mere curiosity but because of the very important advent of the automobile and other forms of transportation. I might mention that we have skiing statutes which indicate that skiers, for example, should ski safely; and that means without having an over amount of alcohol in their bodies when they are skiing, so [53] they don't ski recklessly.

Alcohol content is important for consumers to know in many different respects; and this is something, even though I will agree that the plaintiff cannot assert the positions of the consumer because they're not representing the consumer, the Court can simply—can certainly consider the present state of affairs as far as what consumers need to know. The status quo, which does not let a consumer know the difference between alcoholic content of light beers and very strong malt liquor, for example, has to be more deceiving than letting this information be available to the public.

I realize that state statutes do control in many, if not most states, concerning the light beers. But we do have states such as Washington, who are not asserting that right to control under the general welfare; and in the State of Washington and other states, certainly this problem llooms [*sic*]. But in this present day of the automobile, where it is important for the consumer to understand what they are drinking and where indeed the driver's tests in many states

check new drivers to make sure they understand the laws and understand how much alcohol is usually contained in beer, wine, and more potent drinks, it is important for consumers to be able to see what alcoholic content is.

Whether the governmental interest is directly advanced by the statute is an interesting question, because we still [54] have the ability of the Bureau, BATF, to regulate, if this statute is declared unconstitutional, in violation of the First Amendment. We still have the opportunity for regulation to make sure that there is no misleading type of information given.

I understand the argument that this could be misleading, but the point is I think that it isn't the disclosure of the alcoholic content which is misleading but the manner in which it is disclosed; and that certainly can be regulated by much less extensive prohibition.

And that takes us to the fourth point of *Hudson*, which is that as stated by the Supreme Court: whether it is not more extensive than is necessary to serve that interest. The statutory prohibition says no listing unless by state law. It says alcoholic content of malt beverages is prohibited unless required by state law. Certainly there can be a much less extensive regulation carefully drawn to achieve the objectives that are argued by the defendant intervenor in this case other than the flat prohibition.

I see none of the cases that have been cited by Intervenor Defendant which convinces this court that the decision should go otherwise. There have been cases cited, a Fifth Circuit case I had a chance to look at. It concerns the use of the term "realtor" and whether that term can be used and limited to members of the board of the national association of realtors. That really is a case which is far different, and [55] regulation by the state there is far different than what we're talking about here.

Experience in Canada, which is a neighboring country, which has a lot of similarities — it's not identical, of course, to the United States but has a lot of similarities — is important. And the plaintiff has pointed out that Canada has not regulated alcoholic content by prohibiting it and that indeed the — I think it appears to be un rebutted that the trend in Canada is towards lower alcoholic content of beer and not greater. And it is urged that consumers knowing the alcoholic content of beer may tend to drink the lower alcoholic content: the whole trend toward light beers, for example. So even though the Canadian experience is not determinative, nevertheless I think it may be shown that the great specters of all the bad things that can happen if this small exception in the statute is stricken are merely specters and will not necessarily come to be; and Canada and other countries are pointed to as examples that this is not the case in countries which do not have this prohibition.

The Court is satisfied that the — in examining the test in *Central Hudson* that this very small part of the statute, the exception clause within the parentheses referring to malt liquors in these two subsections stands as an unconstitutional restraint on commercial speech under the test in *Hudson* and shall not be enforced.

[56] The case came to be because Coors asked BATF to approve certain labeling; and at this time, the parties are just Coors for the plaintiff, BATF as the defendant, and of course, the defendant intervenor, who is asserting the interest of the House of Representatives. But I have no problem in declaring today that the statute constitutes an unconstitutional restraint on commercial speech and that it may not be enforced, it shall not be enforced.

And again, I want to make very clear that when we're talking about the statute, we're talking about the excep-

tional—the exception within the parentheses referring to malt beverages contained in 27 U.S.C. 205(e)(2) and (f)(2). And it's only that limited amount of wording within the exception clause referring to malt beverages.

May I inquire, because we only have parties at this time of Coors, BATF, and of course the House of Representatives—may I inquire whether there—are you asking that this order be—I'm not sure what the—how broadly this order should be stated. I have no problem in saying that it shall not be in force as to Coors and BATF can go ahead and consider whether their label is proper. But we certainly don't have other breweries included with the plaintiff.

MR. OADE: Your Honor, I believe if it's unconstitutional, the BATF cannot enforce it against anybody; and that's the relief that we asked for in our complaint, and [57] we just ask that they consider our application on the merits and anybody else's as well, your Honor.

THE COURT: Well, they obviously have to consider your application on the merits. It's very difficult to see how the statute can be an unconstitutional restraint on commercial speech and not be enforced against you but can be enforced against others.

MR. OADE: That's what we asked for in our complaint: that it be declared unconstitutional and the BATF be enjoined from enforcing 205(e)(2) and 205(f)(2).

THE COURT: I think you have to be again careful, because 205(e)(2) and 205(f)(2) are broader than what I am declaring as an unconstitutional restraint.

MR. OADE: Insofar as it prohibits the advertisement of percentage alcohol content of malt beverages and statements on the label.

THE COURT: That is correct.

MR. OADE: Yes.

THE COURT: Did you want to respond in any way?

MS. JARUZELSKI: Our only response would be to call to the Court's attention that it is clear that to the extent this is enjoined, it's enjoined in this jurisdiction; and while that would be the law of this jurisdiction, this court does not have power to enforce a nationwide ban. And that's clear from, for example, the *Amaron* case, which came up through the District [58] Court in New Jersey to the Third Circuit and ultimately to the Supremes.

THE COURT: I'm not sure I agree with you. This is a Federal Court. Coors is a Federal brewer selling throughout all 50 states and perhaps—and I'm sure abroad, although we're not talking about international sales. But my decision applies as far as Coors is concerned, as far as BATF is concerned, nationwide.

MS. JARUZELSKI: I would respectfully disagree, your Honor, but—

THE COURT: I don't see how you can possibly argue that it's limited only to Colorado, when the sales of Coors are nationwide and this is a national statute or a Federal statute, not a state statute.

MS. JARUZELSKI: I can only say that that has been the position that has been taken in other cases where district courts have tried to enjoin Federal agencies nationwide.

THE COURT: Well, we have the attorney sitting in court representing—the local attorney representing BATF; and my order will be that BATF shall not enforce this unconstitutional restraint concerning Coors; and as far as I'm concerned, that's—that has to be nationwide. I frankly feel that it should not be enforced, since I'm declaring it unconstitutional.

Assuming this is going to be appealed and there is [59] going to be a circuit decision that's going to look at it and assuming that the circuit agrees with me, it would be an absolutely impossible situation for BATF to enforce this as to one brewer and not as to others.

Mr. Pharo, I don't know if you have a position on this or not.

MR. PHARO: Well, your Honor, I think courts throughout the country that have jurisdiction over the government enjoin action, and it's normally nationwide; so that would be my guess, would be that your order would be enforceable or declare it unconstitutional as to all brewers and it would be nationwide.

THE COURT: Well, maybe I should make a decision on this. I was going to hear the comments of the parties, but it seems to me that it's an absolutely impossible situation to declare something unconstitutional just as to a certain area or as to a certain brewer; and the Court therefore will order that this statute is unconstitutional as a restraint on commercial speech, the limited part of the statute that I've previously described, and that it shall not be enforced by BATF. And we'll certainly allow the intervenor defendant to appeal this decision, and I welcome Tenth Circuit inquiry into it.

I may very well reduce this verbal decision to writing within the next week or two, and I will send copies of it to all concerned. But the decision will be effective as of today, [60] and what I've said on the record will be incorporated by reference as if fully set forth and stands as the declaratory judgement of the Court.

I want to thank the attorneys. It's been very interesting, and I appreciate the briefs and the very excellent argument. I don't know if we have anyone present from Heileman Brewery, but the amicus brief that Heileman did was also very helpful.

MR. OADE: Thank you, your Honor; and I'll thank Heileman on behalf of the Court.

THE COURT: Okay. If there is nothing further, we'll take a short recess and then come back and call up the next case.

(Thereupon, the hearing was concluded and the Court recessed at 10:50 a.m.)

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 92-1348

ADOLPH COORS COMPANY, PLAINTIFF-APPELLEE

v.

NICHOLAS BRADY, IN HIS OFFICIAL CAPACITY AS SECRETARY
OF THE UNITED STATES DEPARTMENT OF TREASURY;
STEVE HIGGINS, IN HIS OFFICIAL CAPACITY AS DIRECTOR
OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
DEFENDANT-APPELLANTS

AND

SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE
U.S. HOUSE OF REPRESENTATIVES,
INTERVENOR-DEFENDANT-APPELLANT

Entered December 1, 1993

ORDER

Before MCKAY, Chief Judge, BARRETT, LOGAN,
SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY,
EBEL and KELLY, Circuit Judges, and BROWN* District
Judge.

* Honorable Wesley E. Brown, Senior District Judge, United States District Court for the District of Kansas, sitting by designation.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court
ROBERT L. HOECKER, Clerk

By /s/ Patrick Fisher
PATRICK FISHER
Chief Deputy Clerk

APPENDIX F STATUTORY PROVISIONS

Title 27:

§ 205. Unfair competition and unlawful practices

It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate:

(a) Exclusive outlet

To require, by agreement or otherwise, that any retailer engaged in the sale of distilled spirits, wine, or malt beverages, purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such requirement is made in the course of interstate or foreign commerce, or if such person engages in such practice to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such requirement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce; or

(b) "Tied house"

To induce through any of the following means, any retailer, engaged in the sale of distilled spirits, wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such

inducement is made in the course of interstate or foreign commerce, or if such person engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce: (1) By acquiring or holding (after the expiration of any existing license) any interest in any license with respect to the premises of the retailer; or (2) by acquiring any interest in real or personal property owned, occupied, or used by the retailer in the conduct of his business; or (3) by furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money, services, or other thing of value, subject to such exceptions as the Secretary of the Treasury shall by regulation prescribe, having due regard for public health, the quantity and value of articles involved, established trade customs not contrary to the public interest and the purposes of this subsection: or (4) by paying or crediting the retailer for any advertising, display, or distribution service; or (5) by guaranteeing any loan or the repayment of any financial obligation of the retailer; or (6) by extending to the retailer credit for a period in excess of the credit period usual and customary to the industry for the particular class of transactions, as ascertained by the Secretary of the Treasury and prescribed by regulations by him; or (7) by requiring the retailer to take and dispose of a certain quota of any of such products; or

(c) Commercial bribery

To induce through any of the following means, any trade buyer engaged in the sale of distilled spirits, wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled

spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such inducement is made in the course of interstate or foreign commerce, or if such person engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such trade buyer in interstate or foreign commerce: (1) By commercial bribery; or (2) by offering or giving any bonus, premium, or compensation to any officer, or employee, or representative of the trade buyer; or

(d) Consignment sales

To sell, offer for sale, or contract to sell to any trade buyer engaged in the sale of distilled spirits, wine, or malt beverages, or for any such trade buyer to purchase, offer to purchase, or contract to purchase, any such products on consignment or under conditional sale or with the privilege of return or on any basis otherwise than a bona fide sale, or where any part of such transaction involves, directly or indirectly, the acquisition by such person from the trade buyer or his agreement to acquire from the trade buyer other distilled spirits, wine, or malt beverages—if such sale, purchase, offer, or contract is made in the course of interstate or foreign commerce, or if such person or trade buyer engages in such practice to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products of if the direct effect of such sale, purchase, offer, or contract is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such trade buyer in interstate or foreign commerce: *Provided*, That this

subsection shall not apply to transactions involving solely the bona fide return of merchandise for ordinary and usual commercial reasons arising after the merchandise has been sold; or

(e) **Labeling**

To sell or ship or deliver for sale or shipment, or otherwise introduce in interstate or foreign commerce, or to receive therein, or to remove from customs custody for consumption, any distilled spirits, wine, or malt beverages in bottles, unless such products are bottled, packaged and labeled in conformity with such regulations, to be prescribed by the Secretary of the Treasury, with respect to packaging, marking, branding, and labeling and size and fill of container (1) as will prohibit deception of the consumer with respect to such products or the quantity thereof and as will prohibit, irrespective of falsity, such statements relating to age, manufacturing processes, analyses, guarantees, and scientific or irrelevant matters as the Secretary of the Treasury finds to be likely to mislead the consumer; (2) as will provide the consumer with adequate information as to the identity and quality of the products, the alcoholic content thereof (except that statements of, or statements likely to be considered as statements of alcoholic content of malt beverages are prohibited unless required by State law and except that, in case of wines, statements of alcoholic content shall be required only for wines containing more than 14 per centum of alcohol by volume), the net contents of the package, and the manufacturer or bottler or importer of the produce; (3) as will require an accurate statement, in the case of distilled spirits (other than cordials, liqueurs, and specialties) produced by blending or rectification, if neutral spirits have been used in the production thereof, informing the consumer of the percentage of neutral

spirits so used and of the name of the commodity from which such neutral spirits have been distilled, or in case of neutral spirits or of gin produced by a process of continuous distillation, the name of the commodity from which distilled; (4) as will prohibit statements on the label that are disparaging of a competitor's products or are false, misleading, obscene, or indecent; and (5) as will prevent deception of the consumer by use of a trade or brand name that is the name of any living individual of public prominence, or existing private or public organization, or is a name that is in simulation or is an abbreviation thereof, and as will prevent the use of a graphic, pictorial, or emblematic representation of any such individual or organization, if the use of such name or representation is likely falsely to lead the consumer to believe that the product has been indorsed, made, or used by, or produced for, or under the supervision of, or in accordance with the specifications of, such individual or organization: *Provided*, That this clause shall not apply to the use of the name of any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer, wholesaler, retailer, bottler, or warehouseman, of distilled spirits, wine, or malt beverages, nor to the use by any person of a trade or brand name used by him or his predecessor in interest prior to August 29, 1935; including regulations requiring, at time of release from customs custody, certificates issued by foreign governments covering origin, age, and identity of imported products: *Provided further*, That nothing herein nor any decision, ruling, or regulation of any Department of the Government shall deny the right of any person to use any trade name or brand of foreign origin not presently effectively registered in the United States Patent and Trademark Office which has been used by such person or predecessors in the United

States for a period of at least five years last past, if the use of such name or brand is qualified by the name of the locality in the United States in which the product is produced, and, in the case of the use of such name or brand on any label or in any advertisement, if such qualification is as conspicuous as such name or brand.

It shall be unlawful for any person to alter, mutilate, destroy, obliterate, or remove any mark, brand, or label upon distilled spirits, wine, or malt beverages held for sale in interstate or foreign commerce or after shipment therein, except as authorized by Federal law or except pursuant to regulations of the Secretary of the Treasury authorizing relabeling for purposes of compliance with the requirements of this subsection or of State law.

In order to prevent the sale or shipment or other introduction of distilled spirits, wine, or malt beverages in interstate or foreign commerce, if bottled, packaged, or labeled in violation of the requirements of this subsection, (1) no bottler of distilled spirits, no producer, blender, or wholesaler of wine, or proprietor of a bonded wine storeroom, and no brewer or wholesaler of malt beverages shall bottle, and (2) no person shall remove from customs custody, in bottles, for sale or any other commercial purpose, distilled spirits, wine, or malt beverages, respectively, after such date as the Secretary of the Treasury fixes as the earliest practicable date for the application of the provisions of this subsection to any class of such persons (but not later than August 15, 1936, in the case of distilled spirits, and December 15, 1936, in the case of wine and malt beverages, and only after thirty days' public notice), unless, upon application to the Secretary of the Treasury, he has obtained and has in his possession a certificate of label approval covering the distilled spirits, wine, or malt beverages, issued by the Secretary in such manner and

form as he shall by regulations prescribe: *Provided*, That any such bottler of distilled spirits, or producer, blender, or wholesaler of wine, or proprietor of a bonded wine storeroom, or brewer or wholesaler of malt beverages shall be exempt from the requirements of this subsection if, upon application to the Secretary, he shows to the satisfaction of the Secretary that the distilled spirits, wine, or malt beverages to be bottled by the applicant are not to be sold, or offered for sale, or shipped or delivered for shipment, or otherwise introduced, in interstate or foreign commerce. Officers of internal revenue are authorized and directed to withhold the release of distilled spirits from the bottling plant unless such certificates have been obtained, or unless the application of the bottler for exemption has been granted by the Secretary; and customs officers are authorized and directed to withhold the release from customs custody of distilled spirits, wine, and malt beverages, unless such certificates have been obtained. The District Courts of the United States, and the United States court for any Territory shall have jurisdiction of suits to enjoin, annul, or suspend in whole or in part any final action by the Secretary upon any application under this subsection; or

(f) Advertising

To publish or disseminate or cause to be published or disseminated by radio broadcast, or in any newspaper, periodical or other publication or by any sign or outdoor advertisement or any other printed or graphic matter, any advertisement of distilled spirits, wine, or malt beverages, if such advertisement is in, or is calculated to induce sales in, interstate or foreign commerce, or is disseminated by mail, unless such advertisement is in conformity with such regulations, to be prescribed by the Secretary of the Treasury, (1) as will prevent deception of the consumer

with respect to the products advertised and as will prohibit, irrespective of falsity, such statements relating to age, manufacturing processes, analyses, guaranties, and scientific or irrelevant matters as the Secretary of the Treasury finds to be likely to mislead the consumer; (2) as will provide the consumer with adequate information as to the identity and quality of the products advertised, the alcoholic content thereof (except the [sic] statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages and wines are prohibited), and the person responsible for the advertisement; (3) as will require an accurate statement, in the case of distilled spirits (other than cordials, liqueurs, and specialties) produced by blending or rectification, if neutral spirits have been used in the production thereof, informing the consumer of the percentage of neutral spirits so used and of the name of the commodity from which such neutral spirits have been distilled, or in case of neutral spirits or of gin produced by a process of continuous distillation, the name of the commodity from which distilled; (4) as will prohibit statements that are disparaging of a competitor's products or are false, misleading, obscene, or indecent; (5) as will prevent statements inconsistent with any statement on the labeling of the products advertised. This subsection shall not apply to outdoor advertising in place on June 18, 1935, but shall apply upon replacement, restoration, or renovation of any such advertising. The prohibitions of this subsection and regulations thereunder shall not apply to the publisher of any newspaper, periodical, or other publication, or radio broadcaster, unless such publisher or radio broadcaster is engaged in business as a distiller, brewer, rectifier, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or

warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate.

The provisions of subsections (a), (b), and (c) of this section shall not apply to any act done by an agency of a State or political subdivision thereof, or by any officer or employee of such agency.

In the case of malt beverages, the provisions of subsections (a), (b), (c), and (d) of this section shall apply to transactions between a retailer or trade buyer in any State and a brewer, importer, or wholesaler of malt beverages outside such State only to the extent that the law of such State imposes similar requirements with respect to similar transactions between a retailer or trade buyer in such State and a brewer, importer, or wholesaler of malt beverages in such State, as the case may be. In the case of malt beverages, the provisions of this subsection and subsection (e) of this section shall apply to the labeling of malt beverages sold or shipped or delivered for shipment or otherwise introduced into or received in any State from any place outside thereof, or the advertising of malt beverages intended to be sold or shipped or delivered for shipment or otherwise introduced into or received in any State from any place outside thereof, only to the extent that the law of such State imposes similar requirements with respect to the labeling or advertising, as the case may be, of malt beverages not sold or shipped or delivered for shipment or otherwise introduced into or received in such State from any place outside thereof.

The Secretary of the Treasury shall give reasonable public notice, and afford to interested parties opportunity for hearing, prior to prescribing regulations to carry out the provisions of this section.

APPENDIX G
REGULATORY PROVISIONS

27 C.F.R.:**§ 7.26. Alcoholic content.**

(a) The alcoholic content and the percentage and quantity of the original extract shall not be stated unless required by State law. When alcoholic content is required to be stated, but the manner of statement is not specified in the State law, it shall be stated in percentage of alcohol by weight or by volume, and not by proof or by maximums or minimums. Otherwise the manner of statement shall be as specified in the State law.

(b) The terms "low alcohol" or "reduced alcohol" may be used only on malt beverage products containing less than 2.5 percent alcohol by volume.

(c) The term "non-alcoholic" may be used on malt beverage products, provided the statement "contains less than 0.5 percent (or .5%) alcohol by volume" appears in direct conjunction with it, in readily legible printing and on a completely contrasting background.

(d) The term "alcohol-free" may be used only on malt beverage products containing no alcohol.

* * * * *

§ 7.29 Prohibited practices.

(a) *Statements on labels.* Containers of malt beverages, or any labels on such containers, or any carton, case, or individual covering of such containers, used for sale at retail or any written, printed, graphic, or other matter accompanying such containers to the consumer shall not contain:

(1) Any statement that is false or untrue in any particular, or that, irrespective of falsity, directly, or by am-

biguity, omission, or inference, or by the addition of irrelevant, scientific or technical matter, tends to create a misleading impression.

(2) Any statement that is disparaging of a competitor's products.

(3) Any statement, design, device, or representation which is obscene or indecent.

(4) Any statement, design, device, or representation of or relating to analyses, standards, or tests, irrespective of falsity, which the Director finds to be likely to mislead the consumer.

(5) Any statement, design, device, or representation of or relating to any guarantee, irrespective of falsity, which the Director finds to be likely to mislead the consumer. Money-back guarantees are not prohibited.

(6) A trade or brand name that is the name of any living individual of public prominence, or existing private or public organization, or is a name that is in simulation or is an abbreviation thereof, or any graphic, pictorial, or emblematic representation of any such individual or organization, if the use of such name or representation is likely falsely to lead the consumer to believe that the product has been endorsed, made, or used by, or produced for, or under the supervision of, or in accordance with the specifications of, such individual or organization: *Provided*, That this paragraph shall not apply to the use of the name of any person engaged in business as a producer, importer, bottler, packer, wholesaler, retailer, or warehouseman, of malt beverages, nor to the use by any person of a trade or brand name that is the name of any living individual of public prominence, or existing private or public organization, provided such trade or brand name was used by him or his predecessors in interest prior to August 29, 1935.

(b) *Simulation of Government stamps.* No label shall be of such design as to resemble or simulate a stamp of the United States Government or of any State or foreign government. No label, other than stamps authorized or required by the United States Government or any State or foreign government, shall state or indicate that the malt beverage contained in the labeled container is brewed, made, bottled, packed, labeled, or sold under, or in accordance with, any municipal, State, Federal, or foreign government authorization, law, or regulation, unless such statement is required or specifically authorized by Federal, State, or municipal, law or regulation, or is required or specifically authorized by the laws or regulations of the foreign country in which such malt beverages were produced. If the municipal or State government permit number is stated upon a label, it shall not be accompanied by an additional statement relating thereto, unless required by State law.

(c) *Use of word "bonded", etc.* The words "bonded", "bottled in bond", "aged in bond", "bonded age", "bottled under customs supervision", or phrases containing these or synonymous terms which imply governmental supervision over production, bottling, or packing, shall not be used on any label for malt beverages.

(d) *Flags, seals, coats of arms, crests, and other insignia.* Labels shall not contain, in the brand name or otherwise, any statement, design, device, or pictorial representation which the Director finds relates to, or is capable of being construed as relating to, the armed forces of the United States, or the American flag, or any emblem, seal, insignia, or decoration associated with such flag or armed forces; nor shall any label contain any statement, design, device, or pictorial representation of or concerning any flag, seal, coat of arms, crest or other insignia,

likely to mislead the consumer to believe that the product has been endorsed, made, or used by, or produced for, or under the supervision of, or in accordance with the specifications of the government, organization, family, or individual with whom such flag, seal, coat of arms, crest, or insignia is associated.

(e) *Curative and therapeutic claims.* Labels shall not contain any statement, design, representation, pictorial representation, or device representing that the use of malt beverage has curative or therapeutic effects if such statement is untrue in any particular or tends to create a misleading impression.

(f) *Use of words "strong", "full strength", and similar words.* Labels shall not contain the words "strong", "full strength", "extra strength", "high test", "high proof", "pre-war strength", "full oldtime alcoholic strength", or similar words or statements, likely to be considered as statements of alcoholic content, except where required by State law. This does not preclude use of the terms "low alcohol," "reduced alcohol," "non-alcoholic," and "alcohol-free," in accordance with § 7.26 (b), (c), and (d).

(g) *Use of numerals.* Labels shall not contain any statements, designs, or devices whether in the form of numerals, letters, characters, figures, or otherwise, which are likely to be considered as statements of alcoholic content, unless required by State law.

(h) *Coverings, cartons, or cases.* Individual coverings, cartons, cases, or other wrappers of containers of malt beverages, used for sale at retail, or any written, printed, graphic, or other matter accompanying the container shall not contain any statement or any graphic pictorial, or emblematic representation, or other matter, which is prohibited from appearing on any label or container of malt beverages.

§ 7.54 Prohibited statements.

(a) *General prohibition.* An advertisement of malt beverages shall not contain:

(1) Any statement that is false or untrue in any material particular, or that, irrespective of falsity, directly, or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific or technical matter, tends to create a misleading impression.

(2) Any statement that is disparaging of a competitor's products.

(3) Any statement, design, device, or representation which is obscene or indecent.

(4) Any statement, design, device, or representation of or relating to analyses, standards, or tests, irrespective of falsity, which the Director finds to be likely to mislead the consumer.

(5) Any statement, design, device, or representation of or relating to any guarantee, irrespective of falsity, which the Director finds to be likely to mislead the consumer. Money-back guarantees are not prohibited.

(6) Any statement that the malt beverages are brewed, made, bottled, packed, labeled, or sold under, or in accordance with, any municipal, State, or Federal authorization, law, or regulation; and if a municipal or State permit number is stated, the permit number shall not be accompanied by any additional statement relating thereto.

(7) The words "bonded", "bottled in bond", "aged in bond", "bonded age", "bottled under customs supervision", or phrases containing these or synonymous terms which imply governmental supervision over production, bottling, or packing.

(b) *Statements inconsistent with labeling.* (1) Advertisements shall not contain any statement concerning a brand or lot of malt beverages that is inconsistent with any

statement on the labeling thereof.

(2) Any label depicted on a bottle in an advertisement shall be a reproduction of an approved label.

(c) *Alcohol content.* Advertisements shall not contain the words "strong," "full strength," "extra strength," "high test," "high proof," "full alcohol strength," or any other statement of alcohol content, or any statement of the percentage and quantity of the original extract, or any numerals, letters, characters, or figures, or similar words or statements, likely to be considered as statements of alcohol content, except where required by State law. This does not preclude use of the terms "low alcohol," "reduced alcohol," "non-alcoholic," and "alcohol-free," as used on labels, in accordance with § 7.26 (b), (c), and (d).

(d) *Class.* (1) No product containing less than one-half of 1 per centum of alcohol by volume shall be designated in any advertisement as "beer", "lager beer", "lager", "ale", "porter", or "stout", or by any other class or type designation commonly applied to fermented malt beverages containing one-half of 1 per centum or more of alcohol by volume.

(2) No product other than a malt beverage fermented at a comparatively high temperature, possessing the characteristics generally attributed to "ale," "porter," or "stout" and produced without the use of coloring or flavoring materials (other than those recognized in standard brewing practices) shall be designated in any advertisement by any of these class designations.

(e) *Curative and therapeutic claims.* Advertisements shall not contain any statement, design, representation, pictorial representation, or device representing that the use of malt beverages has curative or therapeutic effects if such statement is untrue in any particular or tends to create a misleading impression.

(f) *Confusion of brands.* Two or more different brands or lots of malt beverages shall not be advertised in one advertisement (or in two or more advertisements in one issue of a periodical or a newspaper or in one piece of other written, printed, or graphic matter) if the advertisement tends to create the impression that representations made as to one brand or lot apply to the other or others, and if as to such latter the representations contravene any provision of §§ 7.50 through 7.54 or are in any respect untrue.

(g) *Flags, seals, coats of arms, crests, and other insignia.* No advertisement shall contain any statement, design, device, or pictorial representation of or relating to, or capable of being construed as relating to the armed forces of the United States, or of the American flag, or of any emblem, seal, insignia, or decoration associated with such flag or armed forces; nor shall any advertisement contain any statement, device, design, or pictorial representation of or concerning any flag, seal, coat of arms, crest, or other insignia, likely to mislead the consumer to believe that the product has been endorsed, made, or used by, or produced for, or under the supervision of, or in accordance with the specifications of the government, organization, family, or individual with whom such flag, seal, coat of arms, crest, or insignia is associated.

(h) *Deceptive advertising techniques.* Subliminal or similar techniques are prohibited. "Subliminal or similar techniques," as used in this part, refers to any device or technique that is used to convey, or attempts to convey, a message to a person by means of images or sounds of a very brief nature that cannot be perceived at a normal level of awareness.

APPENDIX H

[SEAL]

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
WASHINGTON, D.C. 20226

[MAY 04, 1987]

C:I:P:VJR
5130

Adolph Coors Company
Golden, CO 80401

Gentlemen:

We have reviewed your letter dated April 15, 1987, submitting two applications for label approval, as well as print and broadcast advertisements. All of these items contain reference to the alcohol content of the beer and you asked that we approve them unconditionally for use in all market areas.

Pursuant to existing law, 27 U.S.C. 205(e)(2) prohibits statements of alcoholic content on labels of malt beverages unless required by state law. Further, section 205(f)(2) prohibits statements in advertising of alcoholic content of malt beverages in states which prohibit such statements by similar law.

We have reviewed your proposed labels and advertising copy, all of which contain statements of specific alcoholic content, e.g., your proposed Coors beer label which states "contains 4.6% alcohol by volume." In view of the specific wording of the statute, we are unable to approve your Applications for Certificates of Label Approval unless such labels are used in states where statements of specific alcoholic content are required. Furthermore, in view of the

specific wording of section 205(f)(2), we are unable to approve the statements of specific alcoholic content in your advertising copy for states which have laws similar to section 205(f)(2).

You may consider our letter to be ATF's final agency action on this issue. We understand your desire to utilize the unqualified reference to alcohol content on malt beverage labels and advertising material, but ATF is charged with the responsibility for administering the statutory provisions of the Federal Alcohol Administration Act as they are written.

/s/ B. Weininger

BRUCE L. WEININGER

Chief, Industry Compliance Division

Enclosures

(2)
No. 93-1631

Supreme Court, U.S.
FILED

MAY 17 1994

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1993

—◆—
LLOYD BENTSEN, SECRETARY OF
THE TREASURY, ET AL.,

Petitioners,

v.

ADOLPH COORS COMPANY,

Respondent.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

—◆—
**RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

—◆—
K. PRESTON OADE, JR.
JIM MICHAEL HANSEN
BRADLEY, CAMPBELL, CARNEY AND
MADSEN
1717 Washington Avenue
Golden, Colorado 80401
(303) 278-3300

Attorneys for Respondent

QUESTION PRESENTED

Whether the Tenth Circuit erred in affirming the district court's holding that the government failed to prove that factually accurate statements of alcohol content on malt beverage labels [such as "3.2% alc/vol"] would lead to strength wars among brewers, and that the government's statutory prohibition of such statements therefore imposed a restraint on commercial speech in violation of the First Amendment.

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No. 93-1631

In The

Supreme Court of the United States

October Term, 1993

LLOYD BENTSEN, SECRETARY OF
THE TREASURY, ET AL.,*Petitioners,*

v.

ADOLPH COORS COMPANY,

*Respondent.*On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth CircuitRESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARIRespondent Adolph Coors Company ("Coors")
respectfully requests this Court to deny the petition for
writ of *certiorari*.

STATEMENT OF THE CASE

In 1935, long before commercial speech was recog-
nized as protected under the First Amendment, Congress
enacted the Federal Alcohol Administration Act, 27
U.S.C. § 201 *et seq.* ("FAAA"). Thereunder, statements of

alcohol content such as "3.2% alc/vol" are prohibited on malt beverage labels unless required by state law. 27 U.S.C. § 205(e)(2). Four decades later, commercial speech was afforded First Amendment protection by this Court for the first time. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S. Ct. 1817, 48 L.Ed.2d 346 (1976). Coors initiated this action in 1987 challenging the labeling restriction as an illegal restraint on commercial speech in violation of the First Amendment.¹

The district court initially found that the labeling prohibition violated the First Amendment. Govt. Pet. App. D. On the first appeal, *Adolph Coors Company v. Brady*, 944 F.2d 1543 (10th Cir. 1991) ("*Coors I*"), the Tenth Circuit held that the first and second tests of *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557, 100 S. Ct. 2343, 65 L.Ed.2d 341 (1980), namely, "protected speech" and "substantial governmental interest," were satisfied. The case was remanded, however, for trial with respect to the third and fourth *Central Hudson* tests, namely, whether the labeling prohibition "directly advanced" the government's asserted interest in preventing strength wars and, if so, whether it was not more extensive than necessary, *i.e.*, a "reasonable fit."

On remand, the district court again found that the labeling prohibition violated the First Amendment. Govt. Pet. App. C. In the government's second appeal, the

¹ Coors had initially also challenged advertising prohibitions set forth in 27 U.S.C. § 205(f)(2). That claim, however, was subsequently dropped at trial and is not an issue in this case.

Tenth Circuit affirmed the district court's determination that the labeling prohibition did not "directly advance" the asserted governmental interest of preventing strength wars, and that the prohibition therefore infringed the First Amendment. *Adolph Coors Company v. Bentsen*, 2 F.3d 355 (10th Cir. 1993) ("*Coors II*"). The Tenth Circuit then found it unnecessary to address the district court's additional determination that the labeling prohibition was more extensive than necessary, *i.e.*, not a reasonable fit. *Id.* at 359, n. 6.

The Tenth Circuit's decision is extremely narrow and limited. It declared unconstitutional only that very specific part of 27 U.S.C. § 205(e)(2) which prohibits alcohol content disclosure on malt beverage labels. This means, in essence, that the brewer is allowed to include a factually accurate statement such as "3.2% alc/vol" on the label without violating federal law. The decision allows consumers to receive truthful alcohol content information on malt beverage labels to make informed consumer choices and does nothing else.

SUMMARY OF ARGUMENT

The government has failed to satisfy any of the *certiorari* criteria appearing in Supreme Court Rule 10.1.

The Tenth Circuit's decision does not conflict with any decision of this Court. It has been settled since at least 1980 that commercial speech cases are subject to the four-part analysis set forth in *Central Hudson*, *supra*. The only dispute in this case involves the third test, *i.e.*, whether the government's labeling prohibition "directly

advances" its asserted interest in preventing strength wars among brewers. Coors presented overwhelming evidence that there have been no strength wars in the wine and distilled liquor industries in the United States, or in the beer industries in other countries such as Canada and the European Community, where alcohol content labeling is required. Further, there is no incentive for brewers to engage in strength wars because mainstream consumers do not like or buy high alcohol content products because they are harsh tasting and are loaded with calories. Based on this evidence, the Tenth Circuit's determination – that the government failed to prove that its labeling prohibition "directly advanced" its goal – is both proper and not contrary to any decision of this Court.

The government's argument that it need only prove that Congress "reasonably believed" at the time of enactment that its prohibition would directly advance its asserted goal was properly rejected by the Tenth Circuit. The government's proposed rational basis test in a First Amendment context is contrary to a host of commercial speech decisions from this Court, including *Edenfield v. Fane*, 507 U.S. ___, 113 S. Ct. 1792, 123 L.Ed.2d 543 (1993).

This is not a case involving a novel, important question of federal law which should be decided by this Court. First, the law is already settled. The Tenth Circuit's decision does not fill a gap in the law or extend any legal concepts. Rather, it represents application of the settled *Central Hudson* four-part test to a particular factual situation. Second, the issues involved are not substantial. The underlying issue – whether a beer label can contain "3.2% alc/vol" – is a relatively minor one. Finally, the constitutionality of state statutes is not at issue in this case. The

Tenth Circuit's decision does not allow a brewer to violate any state law. State regulation of alcohol raises Twenty-first Amendment issues which are not present in this case.

The government's petition for writ of *certiorari* should be denied.

ARGUMENT

A. The Tenth Circuit Has Not Decided A Federal Question In A Way That Conflicts With Applicable Decisions Of This Court.

The Tenth Circuit's decision is consistent with, not contrary to, all commercial speech decisions of this Court, and therefore *certiorari* is not warranted under Supreme Court Rule 10.1(c).²

1. All Commercial Speech Decisions Of This Court Use The Four-Part Commercial Speech Analysis Which Was Applied By The Tenth Circuit.

Since at least 1980, when this Court decided *Central Hudson, supra*, the law has been clear that commercial

² Supreme Court Rule 10.1 sets forth the reasons that will be considered in support of granting a petition for writ of *certiorari*. The government's petition rests upon only two of the enumerated reasons: (1) the Tenth Circuit's decision conflicts with applicable decisions of this Court; and (2) the Tenth Circuit has decided an important question of federal law which has not been, but should be, settled by this Court. *See* Supreme Court Rule 10.1(c). The government does not seek *certiorari* under Rule 10.1(a) or (b).

speech cases are subject to a four-part analysis.³ The *Central Hudson* four-part test has been applied in every one of this Court's commercial speech cases for the last decade.⁴ The government does not contend in its petition that this four-part test should be changed. Thus the commercial speech test used by the Tenth Circuit is not in conflict with any decision of this Court, and *certiorari* is not warranted under Supreme Court Rule 10.1(c).

³ Therein this Court stated:

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson, supra, 447 U.S. at 566.

⁴ See *Edenfield v. Fane*, 507 U.S. ___, 113 S. Ct. 1792, 123 L.Ed.2d 543 (1993); *United States v. Edge Broadcasting Company*, 509 U.S. ___, 113 S. Ct. 2696, 125 L.Ed.2d 345 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. ___, 113 S. Ct. 1505, 123 L.Ed.2d 99 (1993); *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 475, 109 S. Ct. 3028, 106 L.Ed.2d 388, 400 (1989); *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328, 106 S. Ct. 2968, 92 L.Ed.2d 266 (1986).

2. The Tenth Circuit's Application Of The Four-Part Test To The Facts Of This Case Does Not Conflict With Any Decision Of This Court.

The Tenth Circuit's application of the four-part *Central Hudson* test to the particular facts of this case does not conflict with any decision of this Court.

a) The First And Second Parts Of The Four-Part Test Are Not At Issue.

Below, the parties did not dispute the first and second *Central Hudson* factors, namely, that factually accurate alcohol content labeling is protected by the First Amendment, and that the government's asserted interest in preventing strength wars among brewers is substantial. See *Coors II, supra*, 2 F.3d at 357, n. 3.

b) The Government Did Not Prove That Its Labeling Prohibition "Directly Advances" Its Asserted Interest In Preventing Strength Wars.

The *only* issue in this case involves the third part of the *Central Hudson* test, namely, whether the government's labeling prohibition "directly advances" its asserted interest of preventing strength wars among brewers. The district court and the Tenth Circuit found that the government failed to prove this connection.

The government's evidence on this issue was weak. First, the government presented some legislative history

from the 1935 time period which it interpreted as evidence that Congress "reasonably believed" that the labeling prohibition would prohibit strength wars. Second, the government presented some evidence that, in the extremely small (3%) malt *liquor* market segment of the malt beverage industry, some manufacturers have attempted to market their products using value laden semantics such as "strong" or "high test."

By stark contrast, Coors presented overwhelming evidence that alcohol content labeling does not lead to strength wars among brewers. First, Coors showed that no strength wars have developed in the wine and distilled spirits industries in the United States where alcohol content (e.g. "80 proof") has appeared on labels for decades.

Second, Coors presented extensive proof that no strength wars have developed among brewers in various states such as Minnesota, and in numerous countries including Canada and the European Community, where alcohol content appears on malt beverage labels.

Third, Coors demonstrated that mainstream consumers do not like or want stronger beer products and thus there is no incentive for brewers to engage in strength wars. Alcohol strength is not a selling point in at least 97% of the consumer market. Mainstream consumers are much more interested in a refreshing taste and fewer calories than they are with high alcohol levels. Most beer products contain 3-5% alcohol, with very few products reaching above 7% alcohol. This is because even a minor increase in alcohol strength above 3-5% makes the taste progressively harsher, to the point of being

"nasty" when the alcohol content approaches the malt *liquor* levels of 7%. Further, more alcohol means more calories. There is a pronounced market shift to no-alcohol, low-alcohol and "light" beers rather than stronger products. Since there is no market demand for high alcohol products, there is no incentive for brewers to engage in "strength wars."

Fourth, Coors showed that it is common knowledge that malt *liquors* have higher alcohol content than regular beer. However, consumers have largely avoided that market segment, which has remained flat at less than 3% of overall sales for many years.

The district court and Tenth Circuit concluded that the government failed to prove that its labeling prohibition directly advanced its asserted interest in preventing strength wars among brewers. This conclusion is evidentiary in nature and clearly not in conflict with any decision of this Court. Therefore certiorari is not warranted under Supreme Court Rule 10.1(c).

c) The Tenth Circuit Did Not Apply The "Wrong Standard" Under The Third Part Of The *Central Hudson* Test.

In its petition, the government argues that the Tenth Circuit applied the "wrong standard" in connection with the "directly advances" test when it applied *Edenfield, supra*, rather than a "reasonably believed" test which the government had proposed. *See* Govt. Pet. at 18-20. The government's proposed "reasonably believed" test is contrary to all of this Court's commercial speech cases.

The government argued to the Tenth Circuit that it should only be required to show that Congress "reasonably believed," when it enacted the labeling restriction at issue here, that the labeling prohibition would directly advance its asserted goal of preventing strength wars. The Tenth Circuit rejected this argument as contrary to this Court's decision in *Edenfield, supra*, which requires the government to prove that its prohibition in fact directly advances its asserted interest.⁵

The Tenth Circuit's rejection of the government's proposed "reasonably believed" standard under the third test of *Central Hudson* was correct and entirely consistent with every commercial speech case decided by this Court.

⁵ The Tenth Circuit stated:

Since the Government filed its appellate brief, however, the Supreme Court has decided *Edenfield v. Fane*, ___ U.S. ___, 113 S. Ct. 1792, 123 L.Ed.2d 543 (1993), in which it articulates a standard that is consistent with our pronouncements *Coors I* and much stricter than the "reasonably believed" standard the Government would have us adopt. In *Edenfield*, the Court stated that, under this third prong of the *Central Hudson* test, courts must determine "whether the challenged regulation advances [the government's] interests in a direct and material way." *Id.*, at ___, 113 S. Ct. at 1798. It went on to say that the party restricting commercial speech carries the burden of justifying the restriction and that "[t]his burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.*, at ___, 113 S. Ct. at 1800.

See *Coors II, supra*, 2 F.3d at 357.

The government has not presented the Tenth Circuit or this Court with a single case which suggests that the government can infringe First Amendment rights simply because it "believes" that what it is doing "directly advances" its goal, irrespective of whether the reality matches the belief. This Court has never so held.

This Court has already clearly resolved the issue that the government's prohibition must directly advance its asserted goal. In *Central Hudson, supra*, this Court held that the "restriction must directly advance the state interest involved," and not that the government need only believe that the restriction directly advances the asserted interest. *Central Hudson, supra*, 447 U.S. at 564, 65 L.Ed.2d at 350. There must be an "immediate connection" between the prohibition and the government's asserted end. *Id.*, 447 U.S. at 569, 65 L.Ed.2d at 353. If the means-end connection is "tenuous" or "highly speculative," the regulation cannot survive constitutional scrutiny. *Id.* Indeed, hopefully the government always believes that its actions advance its goals. However, the case law demonstrates that governmental beliefs can be wrong, and when they are they must give way to the First Amendment, irrespective of good intentions or beliefs.⁶

⁶ See *Lindmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97 S. Ct. 1614, 52 L.Ed.2d 155 (1977) (ban on the use of "for sale" signs in front of houses does not directly advance township's goal of integrated housing); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S. Ct. 1817, 48 L.Ed.2d 346 (1976) (advertising ban does not directly advance professional standards); *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, 53 L.Ed.2d 810 (1977) (ban on advertising does not directly advance goal of protecting the quality of a lawyer's work).

In some cases, such as *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328, 106 S. Ct. 2968, 92 L.Ed.2d 266 (1986), for example, the connection between the government's goal and its method of directly advancing that goal is obvious and immediate, and the government's proof is easy. In that case, this Court found, without much discussion, that the government's goal (reducing gambling by its residents) was directly advanced by its action (a ban on gambling advertisements). The connection between advertising and consumer demand for the advertised product was found almost as a matter of common sense. However, there is no suggestion in *Posadas* that the government's belief was incorrect or inconsistent with fact, that the government's belief would reign supreme if it were incorrect or inconsistent with fact, or that the parties even disputed the issue.

In other cases, the connection between the government's goal and its method of directly advancing that goal is not so obvious, and the government's proof is more difficult. For example, in *Edenfield, supra*, which was relied on by the Tenth Circuit, this Court struck down a state's restriction on client solicitations by CPAs as violative of the First Amendment right to exercise commercial speech. Therein, it was not so obvious that the government's goal (protecting consumers from fraud or overreaching by CPAs) was directly advanced by its action (prohibiting CPAs from soliciting clients). This Court unequivocally required the government to prove that the goal was indeed directly advanced by the prohibition. "[S]peculation or conjecture" by the government was not enough. *Edenfield, supra*, 123 L.Ed.2d at 555.

Rather, the government was required to "demonstrate [*i.e.*, prove] that the harms it recites are real and that its restriction will *in fact* alleviate them to a material degree." *Id.* (emphasis added). This Court then noted that the evidentiary record in that case did "not disclose any anecdotal evidence . . . that validates the [government's] suppositions [*i.e.*, "beliefs"]." *Id.* (emphasis added).

This Court's string of commercial speech cases from *Central Hudson* forward to *Edenfield* makes clear that the commercial speech test is a real life inquiry, not merely one of congressional "belief." See, *e.g.*, *United States v. Edge Broadcasting Company*, 509 U.S. ___, 113 S. Ct. 2696, 125 L.Ed.2d 345 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. ___, 113 S. Ct. 1505, 123 L.Ed.2d 99 (1993); *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 475, 109 S. Ct. 3028, 106 L.Ed.2d 388, 400 (1989).

In fact, this Court has expressly rejected a "rational basis" test in connection with the fourth *Central Hudson* test. In *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 109 S. Ct. 3028, 106 L.Ed.2d 388 (1989), this Court, in addressing the fourth *Central Hudson* factor, held that the government need not prove that its restriction is absolutely the least severe that will achieve the desired end, but need only be a reasonable fit. *Id.*, 492 U.S. at 480, 106 L.Ed.2d at 404. In so stating, this Court made clear the government must prove considerably more than a rational basis for the fit between the prohibition and the goal:

We reject the contention that the test we have described is overly permissive. It is far different, of course, from the "rational basis"

test used for the Fourteenth Amendment equal protection analysis.

Id. This rejection of a rational basis test in connection with the *Central Hudson* test was recently reiterated by this Court in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. ___, 113 S. Ct. 1505, 123 L.Ed.2d 99 (1993) as follows:

To repeat, see n 12, *supra*, while we have rejected the "least-restrictive-means" test for judging restrictions on commercial speech, so too have we rejected mere rational basis review.

Id., 123 L.Ed.2d at 108, n. 13.

Contrary to the government's assertion, the Tenth Circuit's decision is entirely consistent with this Court's recent decision in *Edge Broadcasting*, which involved an entirely different issue. In that case, the plaintiff argued that the government's restriction "as applied" specifically to the plaintiff did not directly advance the asserted governmental interest. This Court held that in applying the third part of the *Central Hudson* analysis, the inquiry was not to be limited to a single entity, but, rather, was to be considered in its general application. It then looked to the actual evidence, and not the congressional "belief," to resolve this issue. In the case at bar, the Tenth Circuit applied the third part of the *Central Hudson* analysis to brewers in general, and not just to Coors or any one entity, concluding that the government's labeling prohibition did not directly advance its asserted interest of preventing strength wars among brewers. Thus the Tenth Circuit's decision is wholly consistent with *Edge Broadcasting*.

The government's other arguments are equally unavailing.⁷

The Tenth Circuit correctly rejected the government's invitation to limit its "directly advance" inquiry solely to what Congress may have "reasonably believed," irrespective of whether the belief matched the reality. It properly considered the record evidence on this issue in addition to the legislative history. Its decision is entirely consistent with all of this Court's commercial speech cases, and therefore *certiorari* is not warranted under Supreme Court Rule 10.1(c).

⁷ The government's argument that the Tenth Circuit "failed to consider the matrix of state laws" is without merit. Govt. Pet. at 16. First, the government never even made this argument to the district court or the Tenth Circuit. Second, the existence or nonexistence of [unidentified] state laws has no relevance to whether the federal government's prohibition directly advances its asserted goal.

The government's argument that the Tenth Circuit "ignored" a congressional intent under the FAAA to respect the state's rights under the Twenty-first Amendment is inapposite. Govt. Pet. at 15. Again, the government never made this argument to the district court or the Tenth Circuit. Also, the Twenty-first Amendment, which gives states broad power to regulate alcohol, has no relevance to whether the government's prohibition directly advances its asserted goal.

Finally, the fact that the labeling prohibition has been on the books since 1935 is of no consequence. It was not even subject to challenge until 1976 when commercial speech was first afforded First Amendment protection by this Court.

B. The Tenth Circuit Has Not Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Decided By This Court.

1. The Law Is Not Unsettled.

The Tenth Circuit has not decided an important question of federal law which has not been, but should be, decided by this Court, and therefore *certiorari* is not warranted under Supreme Court Rule 10.1(c). As discussed above, the four-part analysis to be applied in commercial speech cases has been firmly settled since at least 1980 and unquestionably remains viable today. The federal judiciary needs no Supreme Court guidance on this well settled test. That the "directly advances" test requires more than a "reasonable belief" by Congress is a founding axiom in this Court's last decade of commercial speech cases and is conclusively resolved by *Edenfield, supra*.

2. An Important Question Of Federal Law Is Not Involved.

The Tenth Circuit's decision is extremely narrow and does not present an important question of federal law which should be decided by this Court. The decision invalidates the government's prohibition of truthful alcohol content, such as "3.2% alc/vol," on beer labels. It does nothing more. All federal *advertising* statutes and regulations remain in full force and effect. For example, brewers still cannot use value laden semantics, such as "strong" or "high test," anywhere, including labels and advertising. Also, all state laws remain in full force and effect.

3. The Constitutionality Of State Statutes Is Not At Issue In This Case.

The government argues that the Tenth Circuit's decision casts serious doubt on the constitutionality of various state laws relating to alcohol content labeling. *See* Govt. Pet. at 22-27. This argument is without merit for two reasons.

First, the constitutionality of any particular state law or regulation is not at issue in this case. The issues joined in the pleadings, and considered by the district court and Tenth Circuit, involve only the constitutionality of a federal statute – 27 U.S.C. § 205(e)(2) – and its implementing regulation. Neither Coors nor any other brewer is authorized, by the Tenth Circuit's decision, to violate any state law.

Second, state regulation of alcohol raises Twenty-first Amendment issues which are not present in this case. States have extremely broad powers under the Twenty-first Amendment to regulate alcohol, whereas the federal government does not. In any case involving state alcohol regulation, the tension between the state's Twenty-first Amendment right to regulate alcohol and the speaker's First Amendment right of commercial speech would need to be resolved. On at least three occasions, this Court, in examining the interface of these two amendments, has given extreme deference to the states' Twenty-first Amendment rights even where the state action infringes upon the First Amendment. *See City of Newport v. Iacobucci*, 479 U.S. 92, 107 S. Ct. 383, 93 L.Ed.2d 334 (1986) (per curiam); *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S. Ct. 2599, 69 L.Ed.2d 357 (1981) (per curiam); *California v. LaRue*, 409 U.S. 109, 93

S. Ct. 390, 34 L.Ed.2d 342 (1972). The interplay of the First and Twenty-first Amendments was not an issue in the case at bar.

Also, even under a strict *Central Hudson* analysis of a state law, the state may assert an interest other than prevention of strength wars in support of its regulation. As is evident, a state's ban on alcohol content labeling presents a different case than the one at bar.

CONCLUSION

This case does not meet any of the *certiorari* criteria set forth in Supreme Court Rule 10.1. The Tenth Circuit's decision represents application of well settled commercial speech principles to a particular factual situation, in a manner entirely consistent with every decision of this Court. Review of this particular case by the Supreme Court would not materially advance commercial speech law. There are no compelling legal or factual issues. The Tenth Circuit's decision does not fill a gap in the law or extend existing law. Further, this Court has already entertained three commercial speech cases in 1993, namely *Edenfield*, *Edge Broadcasting*, and *Discovery Network*. The petition should be denied.

Respectfully submitted,

K. PRESTON OADE, JR.

JIM MICHAEL HANSEN

BRADLEY, CAMPBELL, CARNEY &

MADSEN

1717 Washington Avenue

Golden, Colorado 80401-1994

(303) 278-3300

Attorneys for Respondent

(3)
No. 93-1631

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In the Supreme Court of the United States

OCTOBER TERM, 1993

LLOYD BENTSEN, SECRETARY OF THE TREASURY,
ET AL., PETITIONERS

v.

ADOLPH COORS COMPANY

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

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Respondent contends that certiorari is unwarranted because the Tenth Circuit's decision "does nothing more" than declare unconstitutional what respondent dismisses as a "relatively minor" Act of Congress. Br. in Opp. 4, 16. But "a decision to declare an act of Congress unconstitutional 'is the gravest and most delicate duty that [a court] is called on to perform,'" *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.)), and the Act at issue here, far from being "relatively minor," governs the sale of malt beverages nationwide. Furthermore, the Tenth Circuit's decision—which upheld respondent's First Amendment challenge to the provision in the Federal Alcohol Administration Act (FAAA) that prohibits statements of alcohol content on the labels of malt beverages, 27 U.S.C.

205(e)(2)—also casts serious doubt on similar labeling restrictions that have been adopted by the majority of the States. A decision with such far-ranging effects warrants review by this Court.

1. In contending to the contrary, respondent first argues (Br. in Opp. 6, 16) that decisions, such as the Tenth Circuit's, that apply the four-part test articulated in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), for analyzing restrictions on commercial speech do not warrant further review, because the *Central Hudson* test "has been firmly settled since at least 1980 * * * [and] [t]he federal judiciary needs no Supreme Court guidance on this well settled test" (Br. in Opp. 16). That categorical argument is refuted by respondent's own submission, which recognizes (Br. in Opp. 6 n.4, 18) that this Court has reviewed decisions applying *Central Hudson* on numerous occasions in the last decade. On one of the most recent occasions, the Court granted certiorari "[b]ecause the court below declared a federal statute unconstitutional and applied reasoning that was questionable under [the Court's] cases relating to the regulation of commercial speech." *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2703 (1993). The same is true here.

2. Our challenge to the Tenth Circuit's reasoning is not "evidentiary in nature," as respondent suggests (Br. in Opp. 9; see also *id.* at 4, 7-9). To the contrary, our petition identifies five legal errors in the Tenth Circuit's analysis, each of which has broad significance for commercial speech jurisprudence.

First, the Tenth Circuit did not fully identify the federal interests underlying the prohibition in Section 205(e)(2) against statements of alcohol content on malt-beverage containers. See Pet. 13-15. Specifically, the Tenth Circuit ignored evidence in the text and legislative history of the FAAA that Section 205(e)(2) was designed to operate in

tandem with state laws regulating alcohol.¹ Because the Tenth Circuit did not accurately identify the "asserted governmental interest" underlying the challenged statute, as required under the second part of the *Central Hudson* test, it erred in determining whether the challenged statute "directly advances" the asserted governmental interest, as required under the third part of the test. *Central Hudson*, 447 U.S. at 566. That is the same sort of error that led this Court to reverse the Fourth Circuit's decision in *Edge Broadcasting*. Pet. 14. The error is a significant one, for it handicaps federal laws that seek to accommodate state regulation in areas of legitimate state concern. Cf. *Edge Broadcasting*, 113 S. Ct. at 2704.

Second, the Tenth Circuit erred by failing to discern any link between the advertising of a product characteristic (in this case, high alcohol content) and the extent to which consumers choose the product on the basis of that characteristic. Pet. App. 21a; see Pet. 15-16. The link is obvious and essential to the proper analysis of First Amendment challenges to advertising restrictions. This Court has consistently recognized that a restriction on the advertising of a product decreases demand for the product. See *Edge Broadcasting*, 113 S. Ct. at 2707; *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328, 342 (1986); *Central Hudson*, 447 U.S. at 569. It follows that a restriction on the advertising of a product characteristic will decrease the extent to which consumers select the product on the basis of that characteristic. Recognition of that common-sense principle underlies the

¹ Contrary to respondent's contention (Br. in Opp. 15 n.7), the government did argue in the Tenth Circuit that the advertising and labeling restrictions in the FAAA were intended to facilitate the enforcement of state laws regulating alcohol. See 89-1203 & 89-1239 Opening Br. for the Defendants-Appellants 24-25 & n.8; see also 89-1203 & 89-1239 Reply Br. for the Defendants-Appellants 5; 89-1203 Br. of Appellants, the Speaker and Bipartisan Leadership Group of the U.S. House of Reps. 10, 11 n.7. That purpose, moreover, is clear on the face of the statute. See Pet. 4-5, 15 & n.14.

decisions upholding state restrictions on the advertising of alcoholic beverage prices against First Amendment challenges. See, e.g., *Queensgate Investment Co. v. Liquor Control Comm'n*, 433 N.E.2d 138 (Ohio) (per curiam), appeal dismissed for want of a substantial federal question, 459 U.S. 807 (1982), cited with approval in *Edge Broadcasting*, 113 S. Ct. at 2707; see also *Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983) (en banc) (upholding against First Amendment challenge state law banning liquor advertising by local media), cert. denied, 467 U.S. 1259 (1984), cited with approval in *Posadas*, 478 U.S. at 347 n.10. Those decisions and the Tenth Circuit's decision in this case cannot be reconciled. Pet. 17 & n.16.²

Third, the Tenth Circuit misread *Edenfield v. Fane*, 113 S. Ct. 1792 (1993), as adopting a "much stricter" standard for applying the third part of the *Central Hudson* test. Pet. App. 5a; see Pet. 19-20. Based on that erroneous reading, the Tenth Circuit accorded no weight to the enactment history of the FAAA. At the same time, the court acknowledged that the history contained evidence that (1) "labels displaying alcohol content resulted in a strength war" among the brewers of malt beverages, and (2) the labeling restriction in Section 205(e)(2) would "result[] over the long term in beers with a lower alcohol content." Pet. App. 6a. It is clear from that evidence that, at the time of its enactment, Section 205(e)(2) directly advanced the government's interest in preventing strength wars. The Tenth Circuit's determination that Section 205(e)(2) no longer does so was based on what the court perceived as post-enactment "changes in the malt beverage industry." Pet. App. 6a. That approach is not justified by *Edenfield*, and it is at odds with other

² Thus, contrary to respondent's assertion (Br. in Opp. 5 n.2), we do rely on Rule 10.1(a) of the Rules of this Court (as well as on Rule 10.1(c)) in seeking certiorari, based on the clear conflict in approach between the decision below and decisions of State courts of last resort, such as *Queensgate*. Pet. 17 n.16.

decisions in which this Court has examined the history of statutes challenged on First Amendment grounds. See, e.g., *Burson v. Freeman*, 112 S. Ct. 1846, 1856 (1992) (plurality).³

Fourth, the Tenth Circuit failed to explain why the government's evidence was not sufficient to sustain the labeling restriction in Section 205(e)(2), while the same evidence was held sufficient, in a ruling by the district court that respondent did not challenge on appeal, to sustain the advertising restriction in Section 205(f)(2). Pet. 20-21.⁴ The district court attempted to justify that apparently anomalous result on the ground that Section 205(e)(2)'s prohibition of alcohol content statements on labels does not add much to what is accomplished by Section 205(f)(2)'s prohibition of such statements in advertising. Pet. App. 37a-38a. In *Edge Broadcasting*, however, this Court condemned similar reasoning as "represent[ing] too limited a view of what amounts to direct advancement of the governmental interest," 113 S. Ct. at 2706, and as failing to allow adequate "room for legislative judgments," *id.* at 2707.⁵

³ Respondent's lengthy discussion of *Edenfield* (Br. in Opp. 9-15) is devoted to refuting an argument that we have not made in the certiorari petition. Contrary to respondent's assertion (*id.* at 9), the petition does not argue that *Edenfield* replaced the "'directly advances' test" with a "'reasonably believed' test." Our argument, instead, is that *Edenfield* does not support the court of appeals' failure to consider the enactment history of the FAAA in determining whether Section 205(e)(2) "directly advances" the asserted governmental interest. See Pet. 19.

⁴ Respondent states that its challenge to the advertising restriction in Section 205(f)(2) was "dropped at trial" (Br. in Opp. 2 n.1), but fails to mention that the district court rejected that challenge on the merits (see Pet. App. 34a).

⁵ Respondent contends (Br. in Opp. 14) that *Edge Broadcasting* is inapposite because it dealt with the issue whether, in reviewing a statute under the third part of the *Central Hudson* test, a court is limited to considering whether the asserted governmental interest is directly advanced by applying the statute to the entity challenging it.

Fifth, the Tenth Circuit erroneously based its holding that Section 205(e)(2) fails the third part of the *Central Hudson* test on a factor that should have been analyzed under the fourth part of the *Central Hudson* test and that, if properly analyzed, would have been insufficient to strike down the statute. As we explain in the certiorari petition (at 20), the Tenth Circuit concluded that Section 205(e)(2) does not directly advance the government's interest in preventing strength wars because it applies to the labeling of all types of malt beverages, whereas the evidence of a continuing threat of strength wars, in the court's view, primarily concerns only one type of malt beverage: so-called "malt liquor." For purposes of our petition, we accept the court of appeals' determination (Pet. App. 7a) that the current evidence of a continuing threat of strength wars primarily concerns malt liquor. But see Pet. 11 (discussing evidence of strength wars outside the malt liquor segment of the market). That determination, however, is relevant not to the question whether the labeling restriction directly advances the government's purpose of preventing strength wars, but rather to the question whether the labeling restriction is "more extensive than is necessary" to achieve that purpose. *Board of Trustees v. Fox*, 492 U.S. 469, 475-481 (1989). The

Respondent fails to grasp the basis of the Court's reasoning. The Court in *Edge Broadcasting* rejected a radio station's contention that the federal statutes that restrict lottery advertising do not directly advance the government's interest in decreasing gambling in States that do not operate lotteries because the statutes only modestly decreased the amount of lottery advertising to which people who listened to the radio station were exposed. *Edge Broadcasting*, 113 S. Ct. at 2706-2707. Respondent advanced, and the Tenth Circuit accepted, a similar contention here: namely, that Section 205(e)(2) does not directly advance the government's interest in preventing strength wars, because it only modestly decreases the extent to which beer can be marketed based on its high alcohol content, in light of the other labeling and advertising restrictions on statements of alcohol content that respondent does not challenge.

latter question is one of "reasonable fit," and therefore should have been considered under the fourth, not the third, part of the *Central Hudson* test.

If the Tenth Circuit had properly considered the issue of reasonable fit under the fourth part of the *Central Hudson* test, it would have been obligated to accord deference to Congress's judgment on the fit between legislative means and ends. See, e.g., *Edge Broadcasting*, 113 S. Ct. at 2707. And if the court had done so, it would have had to conclude that there is a reasonable fit between the scope of the labeling restriction and the prevention of strength wars. As explained in the petition (at 22-23), Congress reasonably could conclude that a labeling restriction that applies to all types of malt beverages is more effective in preventing strength wars than one that applies only to malt liquor.⁶

⁶ Respondent does not accurately characterize the record or the court of appeals' assessment of it. For example, respondent asserts that it proved that "no strength wars have developed in various states such as Minnesota, and in numerous countries including Canada * * *, where alcohol content appears on malt beverage labels." Br. in Opp. 8. Respondent fails to mention, however, that the court of appeals found that the evidence "support[ed] the Government's assertion that there is a continuing threat of strength wars" and that respondent "d[id] not contest * * * the existence of such a threat" in the court of appeals. Pet. App. 7a. In any event, the current absence of strength wars in Minnesota or any other State does not establish that no threat of them exists, because Minnesota and every other State ban some statements of alcohol content on malt beverage labels, at least under certain circumstances. Pet. 23-27 & 26 n.23. Moreover, the federal restriction on the *advertising* of the alcohol content of malt beverages (27 U.S.C. 205(f)(2)) applies in every State, to the extent consistent with state law. The evidence concerning Canada included the fact that respondent produces its own beer with higher alcohol content in that country than in the United States, and that the demand for "light beer" is considerably lower in Canada than in the United States. II Tr. 228-229, 231. Respondent further asserts that the record showed that "there is no incentive for brewers to engage in strength wars." Br. in Opp. 8. That assertion is belied by the abundant evidence that respondent and other brewers have aggressively (and in many cases, illegally) marketed

3. We argue in the certiorari petition that, instead of applying a "much stricter" standard than this Court has applied in *Central Hudson* and its progeny, the Tenth Circuit should have applied a *less* stringent standard in reviewing respondent's First Amendment challenge to Section 205(e)(2). Pet. 19-20. That argument is based on the fact that Section 205(e)(2) was intended to operate in tandem with and facilitate the enforcement of state laws regulating alcoholic beverage labeling and advertising, and that, by virtue of the Twenty-First Amendment, such state laws are entitled to an "added presumption in favor of * * * validity," *California v. LaRue*, 409 U.S. 109, 118 (1972), when challenged on First Amendment grounds.

Respondent never comes to grips with our argument.⁷ It does not dispute our submission that Congress intended in enacting Section 205(e)(2) to facilitate the enforcement of state laws regulating alcohol. Nor does it dispute that a state law identical to Section 205(e)(2) would be entitled under *LaRue* to an "added presumption" of validity in a First Amendment challenge. Finally, respondent does not attempt to justify a scheme of First Amendment review under which a *state* law could be upheld while a *federal* law integrally related to the effective enforcement of the state law could be invalidated. And nothing in the language of the Twenty-First Amendment justifies such a dual standard.⁸

their beer based on its high alcohol content. Pet. 10-11. Respondent also asserts that "it is common knowledge that malt *liquors* have higher alcohol content than regular beer[s]." Br. in Opp. 9. Respondent's own official testified to the contrary. II Tr. 194 (quoted in Pet. 22).

⁷ Instead, respondent asserts that we did not make that argument below; but, as explained in note 1, *supra*, respondent is wrong.

⁸ The significant authority over alcohol conferred by "the broad sweep of the Twenty-first Amendment" (*LaRue*, 409 U.S. at 114) is not limited to the States. The Amendment also applies to "Territor[ies]" and "possession[s]" of the United States, which are governed by federal law. See U.S. Const. Art. IV, § 3. Moreover, Congress has concluded in the FAAA and other statutes that the Amendment authorizes it to

4. Respondent does not, in the end, take issue with our submission (Pet. 23-27) that the Tenth Circuit's decision casts serious doubt on the constitutionality of the laws regulating malt beverage labeling that have been adopted in the majority of the States, including every State in the Tenth Circuit. Although respondent notes that "the constitutionality of any particular state law or regulation is not at issue in this case," Br. in Opp. 17, it is doubtful that respondent (or any other brewer) would eschew reliance on the Tenth Circuit's decision in a challenge to one of the numerous state laws modeled on the federal provision that the Tenth Circuit has struck down.

Moreover, the confusion and doubts resulting from the Tenth Circuit's decision are not limited to its impact on state laws. The decision below also creates disuniformity among geographic regions and between respondents and its competitors with respect to the constitutional authority of the Secretary of the Treasury to enforce Section 205(e)(2) itself. Especially in these circumstances, the Tenth Circuit's decision holding an Act of Congress unconstitutional warrants review by this Court.

* * * * *

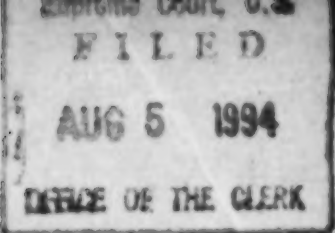
For the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

MAY 1994

enact legislation facilitating the enforcement of state laws regulating alcohol. See 27 U.S.C. 203; 18 U.S.C. 1262 (making it a federal crime to import "any intoxicating liquor" into a State in violation of state law).



(4)
No. 93-1631

In the Supreme Court of the United States

OCTOBER TERM, 1994

**LLOYD BENTSEN, SECRETARY OF THE TREASURY,
PETITIONER**

v.

COORS BREWING COMPANY

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

JOINT APPENDIX

**BRUCE J. ENNIS, JR.
JENNER & BLOCK
610 13th St., N.W.
Washington, D.C. 20005
(202) 639-6025**

**K. PRESTON OADE, JR.
BRADLEY, CAMPBELL, CARNEY
& MADSEN
1717 Washington Ave.,
Golden, Colorado 80401
(303) 278-3300**

*Counsel of Record
for Respondent*

**DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217**

*Counsel of Record
for Petitioner*

**PETITION FOR WRIT OF CERTIORARI FILED
APRIL 15, 1994
CERTIORARI GRANTED JUNE 13, 1994**

366 pp
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EDITOR'S NOTE

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

87-Z-977

ADOLPH COORS COMPANY

v.

JAMES BAKER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF
THE UNITED STATES DEPT. OF TREASURY, STEVE HIGGINS,
IN HIS OFFICIAL CAPACITY AS DIRECTOR BATB

SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE
U.S. HOUSE OF REPRESENTATIVES,
DEFENDANT IN INTERVENTION

DOCKET ENTRIES

DATE	PROCEEDINGS
1987	
7/2	COMPLAINT . . pd Summons Issued
7/14	Return of Service of S&C to Linda Blan, recep- tionist for U.S. Atty on 7/9/87
7/22	MOTION for Extension of Time by defts to 9/8/87 to answer or plead to complaint . . . com
7/28	MINUTE ORDER (ZLW) . . . def granted to 9/8/87 to respond . . . COM . . eod 7/29/87
9/2	MOTION for Enlargement of Time (to answer or otherwise respond to complaint to 10/8/87) . . . by defts . . . cos

(1)

DATE	PROCEEDINGS
1987	
9/3	Notice of Substitution of Counsel (Nancy E. Rice for James R. Cage) . . . by Defts com
9/17	MINUTE ORDER (ZLW) . . . deft's motion for enlargement of time to answer or respond to pltf's complaint is GRANTED to 10/8/87 . . . com . . . eod 9/18/87
10/13	RESPONSE to defts' motion to stay . . by pltf . . com
10/22	ANSWER by defts Baker and Higgins . . . cos MOTION for Stay by defts . . . cos
11/3	MINUTE ORDER (ZLW) . . . defts' motion for stay is GRANTED to 11/23/87 . . . com . . . eod 11/4/87
1988	
1/8	MOTION of Speaker and Bipartisan Leadership Group of the U.S. House of Representatives to Intervene . . . cos Memorandum of Points and Authorities in Support of the Motion of the Speaker and Bipartisan Leadership Group of the U.S. House of Representatives to Intervene by pltf.
1/15	Notice of Substitution of Counsel by Daniel S. Maus for Nancy Rice . . . com
2/4	Response of Plaintiff to the Motion to Intervene by the Speaker and Bipartisan Leadership Group of the U.S. House of Representatives . . . com
6/17	Notice of substitution by William Pharo for Daniel Maus . . by deft, USA . . com
7/28	MINUTE ORDER (ZLW) . . . the court will consider the motion of Speaker and Bipartisan Leadership Group of The U.S. House of Representa-

DATE	PROCEEDINGS
1988	
	tives to Intervene when movant has complied with FRCP 24(c) . . . since deft's motion to stay expired 11/23/87, case shall either proceed to trial or counsel move to continue stay . . . com . . . eod 7/28/88
8/15	Letter to Steven R. Ross from Thomas J. Carney re: if nothing is heard from Mr. Ross by 9/1/88, it will be assumed that there is no desire to pursue matter
8/18	copy of Letter to Mr. Carney from Steven R. Ross re: propose to file papers responsive to Court's order by 9/26/88
9/26	ANSWER of Intervenor-Defendants Speaker and Bipartisan Group of the U.S. House of Representatives . . . cos
9/29	ORDER (ZLW) . . . the motion to intervene is GRANTED . . . com . . . eod 9/30/88
10/13	Amended certificate of mailin[g] Order entered 9/29/88.
10/18	ORDER OF REFERENCE (ZLW) . . . to magistrate Abram to conduct discovery and pretrial matters . . . com . . . eod 10/21/88
10/20	ORDER (DEA) . . . scheduling conf set 11/15/88 at 8:00 . . . com . . . eod 10/21/88
11-15	MINUTE ORDER (DEA) that motions for summary judgment due 2-28-89 . . . Discovery to be completed by 1-31-89 . . . Answer briefs to any motions for summary judgment due 3-31-89 & replies by 4-14-89 . . . com . . . eod 11-16-88

DATE	PROCEEDINGS
1988	
12/7	Answers and Objections of Intervenor-Defendants to Plaintiff's Firss [sic] Set of Interrogatories and Response to Request for Production . . . co [sic] s
1989	
2/28	MOTION of Speaker and Bipartisan Leadership Group of U.S. House of Representatives for Summary Judgment . . . cos Memorandum of Points and Authorities in Support of the House's Motion for Summary Judgment Upholding the Statute . . . cos Motion for Leave to Appear Through Counsel for the U.S. House of Representatives and Without Appointment of Local Counsel of Steven R. Ross, Charles Tiefer and Janina
3/2	MOTION of Plaintiff for Summary Judgment, Brief in Support of Motion, Exhibits, Certificate of Mailing
3/9	MINUTE ORDER (ZLW) . . . that intervenor-defts' motion for leave to appear through counsel for US House of Representatives and W/O Appointment of local counsel is GRANTED . . . court reserves right to require appearance of local counsel . . . com . . . eod 3/10/89
3/10	ORDER (DEA) . . . counsel for plt shall report to Magistrate by 3/22/89 re status as to written discovery . . . com . . . eod 3/10/89

DATE	PROCEEDINGS
1989	
3/24	MOTION of Plaintiff for Extension of Time to file its answer brief to deft's motion for summary judgment to 4/10/89 . . . com
3/27	MINUTE ORDER (ZLW) . . . plf motion for extension to file answer brief to motion for summary judgment GRANTED to 4/10/89 . . COM . . eod 3/28/89
3/30	Opposition of House to Plaintiff Coors' Cross-Motion for Summary Judgment . . . cos Response of House Intervenor-Defendant to Plaintiff's Motion for Extension of Time . . . cos
4/5	Letter from Janina Jaruzelski re: attached copy of public hearing on Misbranding Regulations cited in House Intervenor's Summary Judgment brief
4/11	Letter from Linda Gavit re: attached documents for Court to take judicial notice of (hearings before Federal Alcohol Control Admin on 11/1/84 and Dept of Treasury draft bill to amend Federal Alcohol Admin Act dated 4/14/89)
4/12	Response of Plaintiffs to the House's Motion for Summary Judgment by The Speaker and Bipartisan Leadership Group . . . com
4/14	MINUTE ORDER (ZLW) . . . that cross motions for summary judgment are set for hearing on 5/31/89 at 8:30 . . . com . . . eod 4/17/89
4/17	Objection of Plaintiff to House Intervenor-Defendant's Motion for Extension of Time to File Reply Brief . . . com

DATE	PROCEEDINGS
1989	
4/18	MINUTE ORDER (ZLW) . . . intervening-deft may have until 5/5/89 to file reply brief . . . that before appearing in this court on 5/31/89, counsel for intervening deft shall be familiar with all applicable local rules . . . com . . . eod 4/18/89
5/5	Reply of House Intervenor-Defendants to Plaintiff's Responses to House's Motion for Summary Judgment . . . cos
5/26	MOTION of G. Heileman Brewing Company, Inc. for Leave of the Court to File Amicus Curiae Brief . . . cos TENDERED Memorandum of G. Heileman Brewing Company, Inc.
5/31	HEARING (ZLW) . . . ORDERED: court declares and adjudged that the statutes, 27 USC §205(e)(2) and §205(f)(2) are unconstitutional only to extent that they prohibit disclosure of alcoholic content of malt beverages . . . the Bureau of Alcohol, Tobacco and Firearms shall not enforce said provisions . . . pltf's motion for summary judgment filed 3/2/89 is GRANTED . . . the motion of Speaker and Bipartisan Leadership Group of US House of Representatives for summary judgment filed 2/2/89 is DENIED . . . eod 6/1/89 ORDER (ZLW) . . . the motion of Speaker and Bipartisan Leadership Group of The U.S. House of Representatives for Summary Judgment is DENIED . . . pltf's motion for summary judgment is GRANTED . . . court declares, adjudges

DATE	PROCEEDINGS
1989	
	and decrees that those specific parts of 27 USC §§205 (e)(2) and (f)(2), prohibiting statements of the alcoholic content of malt beverages are unconstitutional restraints on commercial speech in violation of the First Amendment of the Constitution of the US . . . the Bureau of Alcohol, Tobacco and Firearms shall not enforce said statutory prohibition . . . com . . . eod 6/2/89
6/2	Reporter's Transcript of hearing on Cross-Motions for Summary Judgment before Judge Weinshienk on 5/31/89 (pages 1-61)
6/30	NOTICE OF APPEAL, filed by Intervenor Defts Speaker and Bipartisan Leadership Group of the U.S. House of Representatives in re: final judgment of 5/31/89 cos. Notice of Transcript Order form due 7/10/89. Notice mailed to all counsel 6/30/89 (U.S.A.)
7/7	Notice of Transcript Order form filed by Intervenor Defts/Appellants (Transcript necessary is already on file)
7/13	Case No. 89-1203 assigned by the Court of Appeals
7/26	NOTICE OF APPEAL, filed by Defts. James Baker and Steven Higgins in re: final judgment of 5/31/89 . . . cos Notice of Transcript Order form due 8/7/89. Notice mailed to all counsel 7/27/89 (U.S.A.)
8/3	Case No. 89-1239 assigned by the Court of Appeals
8/7	Notice of Transcript Order form filed by Deft/Appellants Baker & Higgins (Transcript necessary is already on file)

DATE	PROCEEDINGS
1990	
2/14	Letter from the Court of Appeals advising that Court has entered an order requiring the transmission of the record on appeal in 89-1203 and 89-1239 by 2/23/90. Designation attached.
2/21	Record on Appeal, consisting of Volumes I and II, transmitted to the Court of Appeals
1991	
11/8	MANDATE from the Court of Appeals (89-1203 and 89-1239) (Issued 11/8/91) JUDGMENT dated (9/23/91) Judgment of the District Court is REVERSED. Cause is REMANDED for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

87-CV-977

ADOLPH COORS COMPANY, PLAINTIFF

v.

JAMES BAKER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF
THE UNITED STATES DEPARTMENT OF TREASURY,
DEFENDANT
STEVE HIGGINS,
IN HIS OFFICIAL CAPACITY AS DIRECTOR BATB, DEFENDANT
SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE
U.S. HOUSE OF REPRESENTATIVES,
INTERVENOR-DEFENDANT

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
11/8/91	—	MANDATE from the Court of Appeals; CA # 89-1203 & 89-1239; Dt issued 11/8/91; Judgement dated (9/23/92) Judgment of the District Court is reversed. Cause is remanded for further proceedings consisted with this opinion. (lf) [Entry date 12/18/91]
12/6/91	1	MINUTE ORDER: by Judge Zita L. Weinshienk case is reopened on the docket of this court; Case referred to Magistrate Judge Donald E. Abram to conduct further discovery (cc: all counsel); entry date: 12/18/91 (lf) [Entry date 12/18/91]

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
12/16/91	2	MINUTE ORDER: by Magistrate Judge Donald E. Abrams; discovery Conf 8:30 12/27/91 (cc: all counsel); entry date: 12/18/91 (lf) [Entry date 12/18/91]
12/31/91	3	MINUTE ORDER: by Magistrate Judge Donald E. Abrams; Mag Conf 8:30 12/27/91 held, ; (Further discovery conf) Mag Conf is scheduled 11:45 am on 1/16/92 (cc: all counsel); entry date; 1/2/92 (pa) [Entry date 01/02/92]
1/10/92	4	NOTICE OF APPEARANCE for defendant James Baker, defendant Steve Higgins by Patricia M. Russotto (yk)
1/14/92	5	MINUTE ORDER: by Judge Zita L. Weinshienk. Defts' notice of appearance [4-1] will be treated as a motion for substitution of counsel and is granted. Patricia M. Russotto is substituted for Thomas Millet as counsel for defts. (cc: all counsel); entry date: 1/15/92 (gc) [Entry date 01/15/92]
1/17/92	6	MINUTE ORDER: by Magistrate Judge Donald E. Abram; rule 16 conference set 11:45 on 2/14/92; Mag Conf held 11:45 on 1/16/92; parties to exchange list of witnesses and depositions by 2/7/92. (cc: all counsel); entry date: 1/21/92 (sh) [Entry date 01/21/92]

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
2/18/92	—	RECORD on appeal consisting of Volumes I and II; returned from the Court of Appeals. (gc)
2/21/92	7	MINUTE ORDER: by Magistrate Judge Donald E. Abram; Rule 16 Conference held 2/14/92; Discovery ddl extended to 9/1/92; Pretrial Conference set for 1:35 p.m. on 9/11/92; the House of Representatives shall file its motion to change status to intervenor by 2/28/92; parties to submit a deposition schedule to the Mag. by 4/1/92. (cc: all counsel); entry date: 2/21/92 (sh)
2/26/92	8	MOTION by intervenor-defendant Speaker & Bipartisan to withdraw as intervening deft and to participate as Amici Curiae (sh)
3/5/92	9	ORDER by Judge Zita L. Weinshienk granting motion to withdraw as intervening defts and to participate as Amici Curiae [8-1] (cc: all counsel); entry date: 3/6/92 (sh) [Entry date 03/06/92]
3/26/92	10	MINUTE ORDER: by Judge Zita L. Weinshienk; Trial to court set for 10:30 a.m. on 10/26/92; Disp Motion ddl 7/27/92. (cc: all counsel); entry date: 3/26/92 (sh)

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
3/27/92	11	NOTICE by plaintiff Adolph Coors Company of taking deposition of Dan Black on 4/27/92. (sh)
4/3/92	12	MOTION by defendant James-Baker, defendant Steve Higgins to amend Order of Court dates 3/26/92 to allow parties to 9/30/92 to file substantive motions. (sh)
4/3/92	13	BRIEF by defendant James-Baker, defendant Steve Higgins in support of motion to amend Order of Court dated 3/26/92 to allow parties to 9/30/92 to file substantive motions. [12-1] (sh)
4/8/92	14	MINUTE ORDER: by Judge Zita L. Weinshienk granting Deft's motion to amend Order of Court dated 3/26/92 to allow parties to 9/14/92 to file substantive motions [12-1], other than evidentiary motions in limine. Trial date to remain in full force and effect. (cc: all counsel); entry date: 4/9/92 (sh) [Entry date 04/09/92]
4/16/92	15	MINUTE ORDER: by Magistrate Judge Donald E. Abram; Telephone Status Conference set for 9:30 a.m. on 7/1/92. (cc: all counsel); entry date: 4/17/92 (sh) [Entry date 04/17/92]
4/27/92	16	NOTICE by plaintiff Adolph Coors Company of taking deposition of Dan Black on 6/1/92, and Req for Prod of documents. (sh)

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
5/11/92	17	MINUTE ORDER: by Magistrate Judge Donald E. Abram; Mag Status Conf 9:30 7/1/92 (cc: all counsel); entry date: 5/11/92 (yk)
7/1/92	18	MINUTE ORDER: by Magistrate Judge Donald E. Abram—Plf and Defts to provide expert reports by 8/14/92. The Treasury Dept. is authorized to file an Amended Answer by 7/31/92. (cc: all counsel); entry date: 7/2/92 (sh) [Entry date 07/02/92]
7/7/92	19	ORDER by Judge Zita L. Weinshienk—Trial to court set to commence 10:30 a.m. on 10/26/92; Status Report ddl 9/17/92; Status Conference set for 8:30 a.m. on 9/24/92. (cc: all counsel); entry date: 7/8/92 (sh) [Entry date 07/08/92]
7/31/92	20	MOTION by plaintiff Adolph Coors Company, and defts to extend Pretrial Schedule. (sh)
7/31/92	21	AMENDED ANSWER by defendant James Baker, defendant Steve Higgins. (sh)
8/5/92	22	MINUTE ORDER: by Magistrate Judge Donald E. Abram granting Stipulated motion to extend Pretrial Schedule [20-1]. (cc: all counsel); entry date: 8/5/92 (sh)

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
8/28/92	23	NOTICE by plaintiff Adolph Coors Company of taking deposition of Tim Ambler on 9/21/92. (sh)
8/31/92	24	NOTICE of Filing Defts' Expert Witness Report by defendant James Baker, defendant Steve Higgins. (sh) [Entry date 09/01/92]
8/31/92	25	Expert Witness Report for defendant James Baker, defendant Steve Higgins. (sh) [Entry date 09/01/92]
9/3/92	26	Amended NOTICE by plaintiff Adolph Coors Company of taking deposition of Tim Ambler on 9/21/92. (sh) [Entry date 09/04/92]
9/14/92	27	PRE-TRIAL ORDER by Magistrate Judge Donald E. Abram—no pending motions, discovery to be completed by 9/15/92, estimated trial to court time is 3 days. (cc: all counsel) (sh)
9/14/92	28	MEMORANDUM by Magistrate Judge Donald E. Abram re Pretrial Order [27-1], Discovery ddl 9/1/92 satisfied/removed; Disp Motion ddl 7/27/92 satisfied; Pretrial Conference held 1:35 9/11/92, terminating case referral to Magistrate Judge Donald E. Abram. (sh)
9/17/92	29	STATUS REPORT by defendants. (sh)
9/17/92	30	MOTION by defendants in limine, or, in the alternative, to continue the trial date. (sh)

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
9/17/92	31	BRIEF by defendants in support of motion in limine [30-1], motion to continue the trial date [30-2]. (sh)
9/21/92	32	Pretrial STATUS REPORT by plaintiff Adolph Coors Company. (sh)
9/21/92	33	Motion by defendants for summary judgment before Judge Zita L. Weinshienk. (sh)
9/21/92	34	EXHIBITS to Defts' Motion for Summ Judgment. (sh)
9/21/92	35	Memorandum BRIEF by defendants in support of motion for summary judgment before Judge Zita L. Weinshienk. [33-1] (Appears to be a faxed copy) (gc) [Entry date 09/22/92]
9/22/92	36	RESPONSE by plaintiff Adolph Coors Company to Defts' motion in limine [30-1], motion to continue the trial date [30-2]. (sh) [Entry date 09/23/92]
9/24/92	37	COURTROOM MINUTES by Judge Zita L. Weinshienk re Plf's Brief in Response to Deft's Motion for Summ Judgment [33-1] to be filed by 10/13/92. Denying Defts' motion in limine [30-1]; denying motion to continue the trial date [30-2]. Status Conference held 8:30 9/24/92; Trial to court set to commence 10:30 a.m. on 10/26/92. Simultaneous trial briefs to be filed by 10/19/92. Defts to file a Motion in Limine re the study con-

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
		ducted in 1988 by 10/1/92. Counsel to provide depositions that the court has to read by 10/19/92. entry date: 9/24/92 (sh)
10/7/92	38	MOTION by defendants Nicholas Brady and Steve Higgins to amend Pretrial Order. (sh)
10/7/92	39	BRIEF by defendants Nicholas Brady & Steve Higgins in support of Defts' motion to amend Pretrial Order [38-1]. (sh)
10/7/92	40	NOTICE by defendants Nicholas Brady & Steve Higgins of Withdrawal of Defts' Expert Witness Report. (sh)
10/9/92	41	MINUTE ORDER: by Judge Zita L. Weinshienk — Status Conference set for 8:30 a.m. on 10/13/92. (cc: all counsel); entry date: 10/13/92 (sh)[Entry date 10/13/92]
10/13/92	42	COURTROOM MINUTES by Judge Zita L. Weinshienk re Plf's Brief re Deft's Motion for Summ Judgment [33-1] due 10/16/92; granting Defts' motion to amend Pretrial Order [38-1]. Status Conference held 8:30 10/13/92; Trial to Court set for 10/26/92 at 10:30 a.m. (for 3 days). entry date: 10/13/92 (sh)
10/15/92	43	RESPONSE by plaintiff Adolph Coors Company to Defts' motion for summary judgment before Judge Zita L. Weinshienk [33-1]. (sh) [Entry date 10/16/92]

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
10/19/92	44	NOTICE of Filing Deposition of Robert Rechholtz by defendant James Baker, defendant Steve Higgins. (sh) [Entry date 10/20/92]
10/19/92	45	STATEMENT — Designations of Deposition Transcripts — by defendants. (sh)[Entry date 10/20/92]
10/19/92	46	Trial brief submitted by defendant James Baker, defendant Steve Higgins. (sh) [Entry date 10/20/92]
10/19/92	47	STATEMENT — Transcript Designations — by plaintiff Adolph Coors Company. (sh) [Entry date 10/20/92]
10/19/92	48	Trial brief submitted by plaintiff Adolph Coors Company. (sh) [Entry date 10/20/92]
10/20/92	49	STIPULATED by parties re use of deposition of Timothy Ambler at Trial. (sh)
10/22/92	50	MINUTE ORDER: by Judge Zita L. Weinshienk denying Defts' motion for summary judgment before Judge Zita L. Weinshienk [33-1]. (cc: all counsel); entry date: 10/22/92 (sh)
10/26/92	51	COURTROOM MINUTES by Judge Zita L. Weinshienk Trial to court commenced 10:30 10/26/92. Opening statements. Deft's case-in-chief. Plf's case-in-chief. entry date: 10/29/92 (sh) [Entry date 10/29/92]

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
10/27/92	52	COURTROOM MINUTES by Judge Zita L. Weinshienk—Trial to Court Day 2—Plf's case-in-chief continues. Closing arguments. entry date: 10/29/92 (sh) [Entry date 10/29/92]
10/28/92	53	Certified Copy of TRANSCRIPT of proceedings—Trial to Court: Bench Ruling held before Judge Weinshienk on 10/28/92. (sh) [Entry date 10/29/92]
10/28/92	54	COURTROOM MINUTES by Judge Zita L. Weinshienk—Trial to Court Day 3—Court's findings & Conclusions. Order: the specific part of 27 U.S.C. Sec. 205(E)(2) prohibiting statements of the alcoholic content in the labeling of malt beverages is an unconstitutional restraint for commercial speech in violation of the First Amendment of the Consitution of the U.S. The ATF Bureau shall not enforce said statutory prohibition effective 11/9/92. Defts to have a stay of execution until 11/9/92. Exhibits returned to counsel. entry date: 10/30/92 (sh) [Entry date 10/30/92]
10/28/92	55	EXHIBIT list by plaintiff Adolph Coors Company. (sh) [Entry date 10/30/92]
10/28/92	56	EXHIBIT list by defendants. (sh) [Entry date 10/30/92]

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
10/28/92	57	Stipulation and ORDER re Custody of Exhibits by Judge Zita L. Weinshienk—counsel to retain exhibits until time to appeal has expired or all appellate proceedings have been terminated plus 60 days. (cc: all counsel); entry date: 10/30/92 (sh) [Entry date 10/30/92]
10/29/92	58	Declaratory JUDGMENT and Injunction: by Judge Weinshienk re Courtroom Trial Minutes [54-2]—the specific part of 27 U.S.C. Sec. 205 (e)(2) prohibiting statements of the alcoholic content in the labeling of malt beverages is an unconstitutional restraint on commercial speech in violation of the Frist Amendment of the U.S. Constitution. The ATF Bureau shall not enforce said statutory prohibition commencing 11/9/92. Defts to have a stay of execution until 11/9/92. Terminating case. (cc: all counsel); entry date: 10/30/92 (sh) [Entry date 10/30/92]
11/9/92	59	MOTION by James Baker, Steve Higgins to stay Enforcement of 10/29/92 Order of Court Pending Appeal. (sh)
11/9/92	60	BRIEF by defendants in support of Defts' motion to stay Enforcement of 10/29/92 Order of Court Pending Appeal [59-1]. (sh)

DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
11/9/92	61	NOTICE OF APPEAL by defendants in re judgment of 10/29/92 [58-2]; Notice of transcript order form due 11/19/92; Notice mailed to all counsel on 11/10/92 Fee Status: USA (gc) [Entry date 11/10/92]

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

 No. 89-1203

ADOLPH COORS COMPANY, PLAINTIFF-APPELLEE

v.

JAMES BAKER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF
THE UNITED STATES DEPT. OF THE TREASURY;
STEVE HIGGINS, IN HIS OFFICIAL CAPACITY AS DIRECTOR
OF BATB, DEFENDANTS

and

SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF
THE U.S. HOUSE OF REPRESENTATIVES,
DEFENDANT-INTERVENOR-APPELLANT

CENTER FOR SCIENCE IN THE PUBLIC INTEREST;
G. HEILEMAN BREWING COMPANY, AMICI CURIAE

DOCKET ENTRIES

DATE	NR	PROCEEDINGS
7/12/89	1	[360313] Civil case docketed. Preliminary record filed. Transcript order form due 7/10/89 for Paul Zuckerman pursuant to R.42.1 Appellant/Petitioner's brief due 8/9/89 for Speaker Appellant's designation of record due 8/9/89 for Speaker Notice of appearance due 7/24/89 for Jania Jaruzelski, for K. Preston Oade, for Thomas J. Carney (kmh) [89-1203]

DATE	NR	PROCEEDINGS
7/12/89	2	[360325] Docketing statement filed by Speaker. Original and 4 copies c/s: y. (kmh) [89-1203]
7/12/89	4	[360549] Notice received from Appellant Speaker that transcript necessary for this appeal is already on file in district court. (kmh) [89-1203]
7/19/89	7	[368154] Notice of appearance filed by K. Preston Oade as attorney for Adolph Coors Company. CERT. OF INTERESTED PARTIES (y/n): n (tc) [89-1203]
7/19/89	8	[368184] Notice of appearance filed by Jania Jaruzelski, Charles Tiefer, Steven R. Ross as attorney for Speaker. CERT. OF INTERESTED PARTIES (y/n): y (tc) [89-1203]
8/7/89	9	[368560] Appellant's stipulated motion filed by Appellant Speaker in 89-1203 to extend time to file appellant's brief until 9/5/89 [89-1203]. Original and 3 copies c/s: y (kmh) [89-1203]
8/8/89	10	[368561] Order filed by RLH granting Appellant/Petitioner motion to extend time to file apet brief and designation of record to 9/5/89. [368560-1] (kmh) [89-1203]
8/29/89	13	[373430] Appellant's motion filed by Appellant Speaker in 89-1203 to extend time to file appellant's brief until 10/5/89 [89-1203]. Original and 3 copies c/s: y (kmh) [89-1203]

DATE	NR	PROCEEDINGS
9/1/89	14	[373432] Order filed by RLH granting Appellant/Petitioner motion to extend time to file apet brief to 10/5/89. [373430-1] (kmh) [89-1203]
10/5/89	16	[380725] Motion for leave to become amicus [89-1203] filed by Center for Science in 89-1203. Original and 3 copies. c/s: y (kas) [89-1203]
10/5/89	17	[380733] Memorandum in support of motion leave to become amicus motion leave to become amicus filed by Center for Science in 89-1203. Original and 3 copies. c/s: y (kas) [89-1203]
10/5/89	19	[380741] amicus brief received from Center for Science in 89-1203, but not filed. Original and 7 copies. c/s: y (kas) [89-1203]
10/5/89	22	[382277] Brief filed by Amicus Curiae Center for Science in 89-1203. Original and 7 copies. c/s: y (kmh) [89-1203]
10/10/89	18	[380735] Motion(s) motion leave to become amicus filed by Amicus Curiae Center for Science in 89-1203 submitted to panel. (kas) [89-1203]
10/16/89	20	[382267] Order filed by Judge(s) Moore, Ebel granting motion leave to become amicus of Center for Science . . . [380725-1] Notice of appearance due 10/26/89 for Bruce A. Silverglade (kmh) [89-1203]
10/23/89	27	[385114] Appellee's stipulated motion to consolidate appeals [89-1203, 89-1239] filed by Adolph Coors Company in

DATE	NR	PROCEEDINGS
		89-1203, Adolph Coors Company in 89-1239. Original and 3 copies. c/s: y (kmh) [89-1203 89-1239]
10/23/89	31	[385122] Appellee's motion to extend time to file appellee's brief until 12/20/89 filed by Adolph Coors Company in 89-1203, Adolph Coors Company in 89-1239. Original and 3 copies. c/s: y (kmh) [89-1203 89-1239]
10/27/89	28	[385115] Order filed by RLH denying Appellee/Respondent motion to consolidate appeals. Appellee shall file one consolidated response brief of no more than 50 pages on or before 12/20/89. [385114-1] in 89-1203, 89-1239 (kmh) [89-1203 89-1239]
10/27/89	32	[385150] Order filed by RLH granting Appellee/Respondent motion to extend time to file res brief [385122-1] 12/20/89 for Adolph Coors Company in 89-1203, for Adolph Coors Company in 89-1239 (kmh) [89-1203 89-1239]
11/6/89	36	[387798] Amicus brief received from G. Heileman Brewing in 89-1203, but not filed. Original and 7 copies. c/s: y (kmh) [89-1203]
11/6/89	37	[388229] Notice of appearance filed by Bruce A. Silverglade in 89-1203 as attorney for Center for Science in 89-1203. CERT. OF INTERESTED PARTIES (y/n): n (kmh) [89-1203]

DATE	NR	PROCEEDINGS
11/6/89	43	[388326] Notice of appearance filed by Erin K. Toll in 89-1203, Joseph E. Meyer in 89-1203 as attorney for G. Heileman Brewing in 89-1203. CERT. OF INTERESTED PARTIES (y/n): y (kmh) [89-1203]
11/6/89	44	[388327] Notice of appearance filed by Reid L. Ashinoff in 89-1203 as attorney for G. Heileman Brewing in 89-1203. CERT. OF INTERESTED PARTIES (y/n): y (kmh) [89-1203]
11/13/89	35	[387797] Motion(s) motion leave to become amicus, motion to present oral argument filed by Amicus Curiae G. Heileman Brewing in 89-1203 submitted to panel. (kmh) [89-1203]
11/13/89	39	[388266] Motion for leave to become amicus [89-1203, 89-1239] filed by G. Heileman Brewing in 89-1203, G. Heileman Brewing in 89-1239. Original and 3 copies. c/s: y (kmh) [89-1203 89-1239]
11/13/89	40	[388267] Motion(s) motion leave to become amicus in 89-1239 filed by Amicus Curiae G. Heileman Brewing in 89-1203, Amicus Curiae G. Heileman Brewing in 89-1239 submitted to panel. (kmh) [89-1203 89-1239]
11/13/89	41	[388268] Motion to participate in oral argument [89-1203, 89-1239] filed by G. Heileman Brewing in 89-1203, G. Heileman Brewing in 89-1239. Original and 3 copies. c/s: y (kmh) [89-1203 89-1239]

DATE	NR	PROCEEDINGS
11/13/89	42	[388269] Motion(s) motion to participate in 89-1203, 89-1239 filed by Amicus Curiae G. Heileman Brewing in 89-1203, Amicus Curiae G. Heileman Brewing in 89-1239 submitted to panel. (kmh) [89-1203 89-1239]
11/24/89	45	[390328] Order filed by Judge(s) Moore, Ebel granting motion leave to become amicus [388266-1], denying motion to participate [388268-1] (kas) [89-1203]
11/24/89	50	[395206] Brief filed by Amicus Curiae G. Heileman Brewing in 89-1203. Original and 7 copies. c/s: y (kmh) [89-1203]
12/4/89	48	[395068] Appellant's brief filed by Speaker in 89-1203. Original and 8 copies. c/s: y. Served on 12/1/89 (kmh) [89-1203]
12/26/89	51	[397685] Appellee's motion to include additional items in the record on appeal filed by Adolph Coors Company in 89-1203, Adolph Coors Company in 89-1239. Original and 3 copies. c/s: y (tas) [89-1203 89-1239]
12/26/89	55	[398886] Designation of record filed by Appellee Adolph Coors Company in 89-1203, Appellee Adolph Coors Company in 89-1239. Original and 1 copies. [89-1203, 89-1239] (kmh) [89-1203 89-1239]
12/26/89	56	[402620] Appellee's brief filed by Adolph Coors Company in 89-1203, Adolph Coors Company in 89-1239. Original and 7 copies. c/s: y. Served on 12/20/89 Oral Argument? y (kmh) [89-1203 89-1239]

DATE	NR	PROCEEDINGS
1/2/90	52	[397688] Order filed by RLH granting in part Appellee/Respondent motion to include additional items in the record on appeal [397685-1] in 89-1203, 89-1239 (tas) [89-1203 89-1239]
1/5/90	59	[402629] Addendum to brief filed by Appellee Adolph Coors Company in 89-1203, Appellee Adolph Coors Company in 89-1239. Original and 2 copies. c/s: y (kmh) [89-1203 89-1239]
1/24/90	57	[402625] Order filed by RLH—designation of record due 2/5/90 for Speaker pursuant to Rule 42. (kmh) [89-1203]
2/12/90	61	[407701] Designation of record filed by Appellant Speaker in 89-1203. Original and 3 copies. [89-1203] (kmh) [89-1203]
2/12/90	62	[407702] Appellant's motion filed by Appellant Speaker in 89-1203 to supplement the record on appeal. Original and 3 copies c/s: y (kmh) [89-1203]
2/13/90	63	[407703] Order filed by RLH granting Appellant/Petitioner motion to supplement the record on appeal [407702-1] (kmh) [89-1203]
2/13/90	64	[407705] Order filed by Judge(s) Holloway—Record on Appeal due 2/23/90 for Zita L. Weinshienk in 89-1203, for Zita L. Weinshienk in 89-1239 pursuant to Rule 11.1. (kmh) [89-1203 89-1239]
2/21/90	65	[409756] Record on appeal filed: 2 Volume(s)—Copy filed in Volume(s) (y/n): n. Volume I (pleadings) Volume II (transcript). original. (kmh) [89-1203 89-1239]

DATE	NR	PROCEEDINGS
8/23/90	67	[450953] Hearing set for November, 1990 Session, at Denver. (sks) [89-1114 89-1122 89-1137 89-1203 89-1239 89-1247 89-1255 89-1310]
11/6/90	68	[466143] Case argued and submitted to Judges McKay, McWilliams, Seymour. (sls) [89-1203 89-1239]
6/14/91	70	[519667] Appellee's motion to take judicial notice of the positions of United States Surgeon General and Inspector General on the desirability of alcohol content labeling on malt beverages [89-1203, 89-1239] filed by Adolph Coors Company in 89-1203, Adolph Coors Company in 89-1239 and submitted to panel. (kc) [89-1203 89-1239]
6/25/91	71	[521282] Supplement to motion to take judicial notice received from Appellee Adolph Coors Company in 89-1203, Appellee Adolph Coors Company in 89-1239 and submitted to panel. (kc) [89-1203 89-1239]
7/15/91	72	Motion that the court take notice of the propose marketing based on alcohol content, of the malt beverage "Powermaster" and the ensuing public debate, including the position taken on the issue by the surgeon general of the United States filed by Speaker in 89-1203, 89-1239 [89-1203, 89-1239]; submitted to panel. (kc) [89-1203 89-1239]
8/1/91	73	[529825] Appellee's response filed by Adolph Coors Company in 89-1203 motion for general relief and submitted to

DATE	NR	PROCEEDINGS
		panel. Original and 3 copies. c/s: y (kc) [89-1203]
9/23/91	74	[541300] Terminated on the Merits after Oral Hearing; Judgment is Reversed and cause is Remanded; Written, Signed, Published. McKay, panel member; McWilliams, panel member; Seymour, authoring judge. [89-1203, 89-1239] (afw) [89-1203 89-1239]
10/2/91	75	[543501] Bill of costs filed by Appellant Brady in 89-1203, Appellant Steve Higgins in 89-1239, Original and 4 copies. c/s: y. (fg) [89-1203 89-1239]
10/16/91	76	[546545] Statement of costs in favor of Appellant in 89-1203, Appellant in 89-1239 filed. (fg) [89-1203 89-1239]
11/8/91	77	[551285] Statement of costs issued for Appellants in 89-1203, and 89-1239 against Appellees in 89-1203, and in 89-1239 in the amount of \$198.00. (afw) [89-1203 89-1239]
11/8/91	78	[551287] Mandate issued to district court. Mandate receipt due 12/9/91 in 89-1203, in 89-1239 Record on appeal return due 3/7/92 in 89-1203, in 89-1239 (afw) [89-1203 89-1239]
11/12/91	79	[551759] Mandate receipt filed. (kc) [89-1203 89-1239]
2/11/92	81	[571553] Record returned Volumes: II VOLS. Record receipt due 3/12/92 in 89-1203, in 89-1239 (gl) [89-1203 89-1239]
2/19/92	82	[573408] Record receipt filed. (gl) [89-1203]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 89-1239

ADOLPH COORS COMPANY, PLAINTIFF-APPELLEE

v.

JAMES BAKER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF
THE UNITED STATES DEPT. OF THE TREASURY;
STEVE HIGGINS, IN HIS OFFICIAL CAPACITY AS DIRECTOR
OF BATB, DEFENDANTS-APPELLANTS

and

SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF
THE U.S. HOUSE OF REPRESENTATIVES,
DEFENDANT-INTERVENOR

G. HEILEMAN BREWING COMPANY, AMICUS CURIAE

DOCKET ENTRIES

DATE	NR	PROCEEDINGS
8/2/89	1	[365661] Civil case docketed. Preliminary record filed. Transcript order form due 8/7/89 for Paul Zuckerman pursuant to R.42.1 Docketing statement due 8/14/89 for Steve Higgins, for James Baker Appellant/Petitioner's brief due 9/5/89 for Steve Higgins Appellant's designation of record due 9/5/89 for Steve Higgins Notice of appearance due 8/14/89 for Thomas Millet, for Sandra M. Schraibman, for William G. Pharo, for Thomas Millet, for Sandra M. Schraibman, for Stuart E. Schiffer, for Thomas Millet, for Sandra M. Schraibman, for William G. Pharo, for K. Preston Oade, for Thomas J. Carnev (tc) [89-1239]

DATE	NR	PROCEEDINGS
8/3/89	2	[366776] Docketing statement filed by James Baker in 89-1239, Steve Higgins in 89-1239. Original and 4 copies c/s: y. (tc) [89-1239]
8/11/89	7	[372053] Notice of appearance filed by Irene M. Solet and John F. Cordes in 89-1239 as attorneys for James Baker and Steve Higgins. CERT. OF INTERESTED PARTIES (y/n): y (klb) [89-1239]
8/15/89	5	[368863] Notice received from Appellant James Baker in 89-1239, Appellant Steve Higgins in 89-1239 that a transcript is not necessary for this appeal. (transcript already on file in district court). (kmh) [89-1239]
8/15/89	11	[373595] Notice of appearance filed by K. Preston Oade in 89-1239 as attorney for Adolph Coors Company in 89-1239. CERT. OF INTERESTED PARTIES (y/n): n (klb) [89-1239]
8/29/89	9	[373427] Appellant's motion filed by Appellant James Baker in 89-1239, Appellant Steve Higgins in 89-1239 to extend time to file appellant's brief until 10/5/89 [89-1239]. Original and 3 copies c/s: y (kmh) [89-1239]
9/1/89	10	[373428] Order filed by RLH granting Appellant/Petitioner motion to extend time to file apet brief to 10/5/89. [373427-1] (kmh) [89-1239]
10/6/89	14	[383701] Appellant's brief received but not filed by James Baker in 89-1239, Steve Higgins in 89-1239. 10/30/89 for Steve Higgins, for James Baker (kas) [89-1239]

DATE	NR	PROCEEDINGS
10/6/89	16	[383859] Notice of appearance filed by John S. Koppel in 89-1239 as attorney for Speaker in 89-1239. CERT. OF INTERESTED PARTIES (y/n): n (kas) [89-1239]
10/6/89	21	[387399] Appellant's brief filed by James Baker, Steve Higgins. Original and 7 copies. c/s: y. Served on 10/5/89 (kas) [89-1239]
10/6/89	34	[402624] Designation of record filed by Appellant James Baker, Appellant Steve Higgins. Original and 1 copies. [89-1239] (kmh) [89-1239]
10/23/89	17	[385114] Appellee's stipulated motion to consolidate appeals [89-1203, 89-1239] filed by Adolph Coors Company in 89-1203, Adolph Coors Company in 89-1239. Original and 3 copies. c/s: y (kmh) [89-1203 89-1239]
10/23/89	19	[385122] Appellee's motion to extend time to file appellee's brief until 12/20/89 filed by Adolph Coors Company in 89-1203, Adolph Coors Company in 89-1239. Original and 3 copies. c/s: y (kmh) [89-1203 89-1239]
10/27/89	18	[385115] Order filed by RLH denying Appellee/Respondent motion to consolidate appeals. Appellee shall file one consolidated response brief of no more than 50 pages on or before 12/20/89. [385114-1] in 89-1203, 89-1239 (kmh) [89-1203 89-1239]

DATE	NR	PROCEEDINGS
10/27/89	20	[385150] Order filed by RLH granting Appellee/Respondent motion to extend time to file res brief [385122-1] 12/20/89 for Adolph Coors Company in 89-1203, for Adolph Coors Company in 89-1239 (kmh) [89-1203 89-1239]
11/13/89	23	[388266] Motion for leave to become amicus [89-1203, 89-1239] filed by G. Heileman Brewing in 89-1203, G. Heileman Brewing in 89-1239. Original and 3 copies. c/s: y (kmh) [89-1203 89-1239]
11/13/89	24	[388267] Motion(s) motion leave to become amicus in 89-1239 filed by Amicus Curiae G. Heileman Brewing in 89-1203, Amicus Curiae G. Heileman Brewing in 89-1239 submitted to panel. (kmh) [89-1203 89-1239]
11/13/89	25	[388268] Motion to participate in oral argument [89-1203, 89-1239] filed by G. Heileman Brewing in 89-1203, G. Heileman Brewing in 89-1239. Original and 3 copies. c/s: y (kmh) [89-1203 89-1239]
11/13/89	26	[388269] Motion(s) motion to participate in 89-1203, 89-1239 filed by Amicus Curiae G. Heileman Brewing in 89-1203, Amicus Curiae G. Heileman Brewing in 89-1239 submitted to panel. (kmh) [89-1203 89-1239]
12/26/89	29	[397685] Appellee's motion to include additional items in the record on appeal filed by Adolph Coors Company in 89-1203, Adolph Coors Company in 89-1239. Original and 3 copies. c/s: y (tas) [89-1203 89-1239]

DATE	NR	PROCEEDINGS
12/26/89	31	[398886] Designation of record filed by Appellee Adolph Coors Company in 89-1203, Appellee Adolph Coors Company in 89-1239. Original and 1 copies. [89-1203, 89-1239] (kmh) [89-1203 89-1239]
12/26/89	33	[402620] Appellee's brief filed by Adolph Coors Company in 89-1203, Adolph Coors Company in 89-1239. Original and 7 copies. c/s: y. Served on 12/20/89 Oral Argument? y (kmh) [89-1203 89-1239]
1/2/90	30	[397688] Order filed by RLH granting in part Appellee/Respondent motion to include additional items in the record on appeal [397685-1] in 89-1203, 89-1239 (tas) [89-1203 89-1239]
1/5/90	35	[402629] Addendum to brief filed by Appellee Adolph Coors Company in 89-1203, Appellee Adolph Coors Company in 89-1239. Original and 2 copies. c/s: y (kmh) [89-1203 89-1239]
1/9/90	32	[401391] Appellant's reply brief filed by James Baker in 89-1239, Steve Higgins in 89-1239. Original and 7 copies. c/s: y (kmh) [89-1239]
2/13/90	36	[407705] Order filed by Judge(s) Holloway—Record on Appeal due 2/23/90 for Zita L. Weinshienk in 89-1203, for Zita L. Weinshienk in 89-1239 pursuant to Rule 11.1. (kmh) [89-1203 89-1239]
2/21/90	37	[409756] Record on appeal filed: 2 Volume(s)—Copy filed in Volume(s) (y/n): n.

DATE	NR	PROCEEDINGS
		Volume I (pleadings) Volume II (transcript). original. (kmh) [89-1203 89-1239]
8/23/90	39	[450953] Hearing set for November, 1990 Session, at Denver. (sks) [89-1114 89-1122 89-1137 89-1203 89-1239 89-1247 89-1255 89-1310]
11/6/90	40	[466143] Case argued and submitted to Judges McKay, McWilliams, Seymour. (sls) [89-1203 89-1239]
6/14/91	42	[519667] Appellee's motion to take judicial notice of the positions of United States Surgeon General and Inspector General on the desirability of alcohol content labeling on malt beverages [89-1203, 89-1239] filed by Adolph Coors Company in 89-1203, Adolph Coors Company in 89-1239 and submitted to panel. (kc) [89-1203 89-1239]
6/25/91	43	[521282] Supplement to motion to take judicial notice received from Appellee Adolph Coors Company in 89-1203, Appellee Adolph Coors Company in 89-1239 and submitted to panel. (kc) [89-1203 89-1239]
7/15/91	44	Motion that the court take notice of the propose marketing based on alcohol content, of the malt beverage "Powermaster" and the ensuing public debate, including the position taken on the issue by the surgeon general of the United States filed by Speaker in 89-1203, 89-1239 [89-1203, 89-1239]; submitted to panel. (kc) [89-1203 89-1239]

DATE	NR	PROCEEDINGS
9/23/91	45	[541300] Terminated on the Merits after Oral Hearing; Judgment is Reversed and cause is Remanded; Written, Signed, Published. McKay, panel member; McWilliams, panel member; Seymour, authoring judge. [89-1203, 89-1239] (afw) [89-1203 89-1239]
10/2/91	46	[543501] Bill of costs filed by Appellant Brady in 89-1203, Appellant Steve Higgins in 89-1239, Original and 4 copies. c/s: y. (fg) [89-1203 89-1239]
10/16/91	47	[546545] Statement of costs in favor of Appellant in 89-1203, Appellant in 89-1239 filed. (fg) [89-1203 89-1239]
11/8/91	48	[551285] Statement of costs issued for Appellants in 89-1203, and 89-1239 against Appellees in 89-1203, and in 89-1239 in the amount of \$198.00. (afw) [89-1203 89-1239]
11/8/91	49	[551287] Mandate issued to district court. Mandate receipt due 12/9/91 in 89-1203, in 89-1239 Record on appeal return due 3/7/92 in 89-1203, in 89-1239 (afw) [89-1203 89-1239]
11/12/91	50	[551759] Mandate receipt filed. (kc) [89-1203 89-1239]
2/11/92	52	[571553] Record returned Volumes: II VOLS. Record receipt due 3/12/92 in 89-1203, in 89-1239 (gl) [89-1203 89-1239]

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

No. 92-1348

ADOLPH COORS COMPANY, PLAINTIFF-APPELLEE

v.

NICHOLAS BRADY, IN HIS OFFICIAL CAPACITY AS SECRETARY
OF
THE UNITED STATES DEPARTMENT OF TREASURY;
STEVE HIGGINS, IN HIS OFFICIAL CAPACITY AS DIRECTOR
OF THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
DEFENDANTS-APPELLANTS

and

SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF
THE U.S. HOUSE OF REPRESENTATIVES,
DEFENDANT-INTERVENOR

DOCKET ENTRIES

DATE	NR	PROCEEDINGS
11/13/92	1	[633648] Civil case docketed. Preliminary record filed. Transcript order form due 11/23/92 for Paul Zuckerman pursuant to R.42.1 Docketing statement due 11/23/92 for Steve Higgins, for Nicholas Brady. Notice of appearance due 11/23/92 for Speaker & Bipartisan, for Steve Higgins, for Nicholas Brady, for Adolph Coors Company. (mbm)
11/17/92	2	[634060] Motion filed by Appellant Nicholas Brady and appellant Steve Higgins for stay of pending appeal [92-1348]. Original and 4 copies c/s: y. (mbm)

DATE	NR	PROCEEDINGS
11/18/92	1	[634781] Acknowledgement of transcript order filed by attorneys for appellants. (afw)
11/18/92	6	[634812] Docketing statement filed by Nicholas Brady, Steve Higgins. Original and 4 copies c/s: y. (mbm)
11/19/92	5	[634783] Transcript order form filed by Paul Zuckerman. Transcript due 1/19/93 for Paul Zuckerman. (afw)
11/24/92	7	[635858] Appellee's response Brief in opposition filed by Adolph Coors Company to Appellant/Petitioner motion for stay of proceedings pending appeal. Original and 3 copies. c/s: y (fg)
12/3/92	12	[639440] Appellant's motion for stay submitted to panel. (afw)
12/4/92	8	[638193] Notice of appearance filed by John S. Koppel, Michael J. Singer as attorney for Nicholas Brady, Steve Higgins. CERT. OF INTERESTED PARTIES (y/n): y. (pdw)
12/4/92	9	[638199] Reply filed by Nicholas Brady, Steve Higgins to Appellee's response to motion for stay. Original and 3 copies. c/s: y. (pdw)
12/11/92	13	[639774] Order filed by Judges McKay, Baldock denying Appellant's motion for stay pending appeal. Parties served by mail. (pdw)
1/4/93	15	[645443] Filed notice record is complete 12/31/92. Appellant/Petitioner's brief due 2/9/93 for Steve Higgins, for Nicho-

DATE	NR	PROCEEDINGS
		las Brady Appellant/Petitioner's appendix due 2/9/93 for Steve Higgins, for Nicholas Brady (afw)
1/6/93	14	[645069] Appellant's motion filed by Nicholas Brady, Steve Higgins to expedite case [92-1348]. Original and 3 copies. c/s: y. (pdw)
1/11/93	16	[646191] Appellant's motion to expedite case submitted to panel. (pdw)
1/19/93	17	[647763] Appellee's response to "Motion to Expedite Oral Argument" filed by Adolph Coors Company. Original and 3 copies. c/s: y (mbm)
1/19/93	18	[647772] Response filed by Adolph Coors Company Document [647763-1] submitted to panel. (mbm)
1/28/93	19	[650206] Order filed by Judges Seymour, Brorby granting Appellant's motion to expedite case—"This appeal shall be set for argument the week of May 10 to 14, 1993. Absent extraordinary circumstances, no extensions of time will be granted." [645069-1] Parties served by mail. (pdw)
2/4/93	21	[652018] Order filed by RLH notice of appearance form due 2/16/93 for Adolph Coors Company. Parties served mail. (afw)
2/12/93	22	[654258] Appellant's brief filed by Nicholas Brady, Steve Higgins. Original and 7 copies. c/s: y. Served on 2/9/93. Oral argument? y. Appendix filed. Original and 1 appendix copy. Appellee/Respon-

DATE	NR	PROCEEDINGS
		dent's brief due 3/15/93 for Adolph Coors Company (mbm)
2/16/93	23	[654735] Notice of appearance filed by K. Preston Oade as attorney for Adolph Coors Company. CERT. OF INTERESTED PARTIES (y/n): n Attorney Thomas J. Carney terminated for Adolph Coors Company (afw)
2/22/93	24	[656196] Hearing set for May 1993 Session, at Denver. (sls)
3/15/93	26	[661924] Appellee's brief filed by Adolph Coors Company. Original and 7 copies. c/s: y. Served on 3/15/93. Oral Argument? y. Appellant's optional reply brief due 4/1/93 for Steve Higgins, for Nicholas Brady. (pdw)
3/15/93	28	[661932] Addendum to brief filed by Appellee Adolph Coors Company. c/s: y. (pdw)
3/16/93	27	[661929] Appellee's brief submitted to panel. (pdw)
3/26/93	29	[664317] Appellee's motion [92-1348] to file supplemental addendum filed by Adolph Coors Company. Original and 3 copies. c/s: y (mbm)
3/26/93	52	[685195] Supplemental Addendum to brief filed by Appellee Adolph Coors Company (SEE order of 6/15/93 granting permission to file). Original only. c/s: y. (pdw)
4/2/93	30	[665879] Appellee's motion to file appendix submitted to panel. (sls)

DATE	NR	PROCEEDINGS
4/2/93	31	[666089] Appellant's reply brief filed by Nicholas Brady, Steve Higgins. Original and 7 copies. c/s: y (fg)
4/2/93	32	[666102] Appellant's motion "For Leave To File Supplemental Appendix" filed by Appellant Nicholas Brady, Appellant Steve Higgins [92-1348]. Original and 2 copies c/s: y (fg)
4/2/93	53	[685196] Supplemental Appendix filed by Appellants Steve Higgins, Nicholas Brady (SEE order of 6/15/93 granting permission to file). Original and 1 copy. c/s: y. (pdw)
4/5/93	34	[666281] Appellant's motion for general relief (for leave to file a supplemental appendix) submitted to panel. (sls)
4/19/93	35	[670552] Appellee's supplemental authority filed by Adolph Coors Company and submitted to panel. Original and 7 copies. c/s: y (fg)
4/26/93	36	[672266] Appellant's response filed by Steve Higgins, Nicholas Brady to Appellee's Supplemental Authority and submitted to panel. Original and 3 copies. c/s: y. (pdw)
4/28/93	37	[673325] Appellant's supplemental authority filed by Steve Higgins, Nicholas Brady and submitted to panel. Original and 8 copies. c/s: y (fg)
4/28/93	38	[673333] Appellee's supplemental authority filed by Adolph Coors Company and submitted to panel. Original and 7 copies. c/s: y (fg)

DATE	NR	PROCEEDINGS
4/29/93	39	[673509] Appellant's settlement conference report filed. Original and 3 copies. (pdw)
5/4/93	40	[674685] Appellant's response to "Plaintiff's Second Supplemental Authority" filed by Steve Higgins, Nicholas Brady Original and 3 copies. c/s: y (fg)
5/4/93	41	[674695] Appellant's response filed by Steve Higgins, Nicholas Brady Document [674685-1] Appellant/Petitioner response Null Relief Code filed by Appellant Steve Higgins, Nicholas Brady submitted to panel. (fg)
5/5/93	42	[675214] Appellee's motion "For Leave To File Record" [92-1348] filed by Adolph Coors Company. Original and 7 copies. c/s: y (fg)
5/5/93	54	[685202] Addendum to brief (referred to in motion to file "record," consists of 10 volumes) filed by Appellee Adolph Coors Company. Original only. c/s: y. (pdw)
5/11/93	43	[676387] Order filed by RLH referring Appellee/Respondent motion for general relief [675214-1] REFERRED TO PANEL ON THE MERITS. Parties served by mail. (fg)
5/11/93	44	[677205] Case argued and submitted to Judges Tacha, Barrett, Brown. (sls)
5/17/93	46	[677937] Appellant's response filed by Steve Higgins, Nicholas Brady to Appellee's motion for leave to file record and submitted to panel. Original and 3 copies. c/s: y. (pdw)

DATE	NR	PROCEEDINGS
5/19/93	47	[678327] Motion to file record relief filed by Appellee Adolph Coors Company submitted to panel. (pdw)
5/21/93	48	[679126] Appellant's motion filed "For Leave To File Exhibits" by Appellant Steve Higgins, Appellant Nicholas Brady [92-1348]. Original and 3 copies c/s: y (fg)
5/21/93	50	[679128] Appellant's motion(s) Appellant/Petitioner motion for "Leave To File Exhibits" submitted to panel. One set of exhibits was filed and is being submitted with the motion to Judge Tacha. (fg)
5/21/93	56	[685207] Exhibits filed by Appellants Steve Higgins, Nicholas Brady (SEE order of 6/15/93 granting permission to file). Original only. c/s: y. (pdw)
6/15/93	51	[685178] Order filed by Judges Tacha, Barrett, Brown granting Appellee's motion to file appendix [664317-1], granting Appellant's motion to file supplemental appendix [666102-1], granting Appellee's motion for "leave to file record" [675214-1], granting Appellant's motion "for leave to file exhibits" [679126-1] Parties served by mail. (pdw)
6/28/93	57	[688314] Appellant's supplemental authority filed by Steve Higgins, Nicholas Brady and submitted to panel. Original and 3 copies. c/s: y (mbm)
8/23/93	58	[701222] Terminated on the Merits after Oral Hearing; Judgment is Affirmed; Written, Signed, Published. Tacha, authoring judge; Barrett; Brown. [92-1348] (afw)

DATE	NR	PROCEEDINGS
10/4/93	59	[711548] Appellant's motion filed by Appellant Steve Higgins, Appellant Nicholas Brady to extend time to file petition for rehearing until 10/21/93 [92-1348]. Original and 3 copies c/s: y (mbm)
10/6/93	60	[712161] Order filed by RLH granting Appellant/Petitioner motion to extend time to file petition for rehearing [711548-1] Parties served by mail. (mbm)
10/21/93	61	[716067] Appellant's motion filed by Steve Higgins, Nicholas Brady to extend time to file petition for rehearing until 11/1/93 [92-1348]. Original and 3 copies. c/s: y. (pdw)
10/26/93	62	[716878] Appellant's motion to extend time to file petition for rehearing until 11/1/93 submitted to panel. (pdw)
10/29/93	63	[717775] Order filed by Judges Tacha, Barrett, Brown granting Appellant's motion to extend time to file petition for rehearing until 11/1/93. NO FURTHER EXTENSIONS WILL BE CONSIDERED [716067-1] Parties served by mail. (pdw)
11/1/93	64	[718191] Petition for rehearing in banc [92-1348] filed by Nicholas Brady, Steve Higgins. Original and 14 copies. c/s: y (fg)
11/1/93	65	[718193] Document [718191-1] Petition for rehearing in banc filed by Appellant Nicholas Brady, Steve Higgins submitted to panel. (fg)

DATE	NR	PROCEEDINGS
11/3/93	68	[718933] FIRST notice of rules violation for Michael J. Singer for Appellant Nicholas Brady, Appellant Steve Higgins (jt)
11/3/93	69	[718935] FIRST notice of rules violation for John S. Koppel for Appellant Nicholas Brady, Appellant Steve Higgins (jt)
12/1/93	70	[724642] Order filed by Judge(s) McKay, Logan, Seymour, Moore, Anderson, Tacha, Baldock, Brorby, Ebel, Kelly, Barrett, Brown denying Petition for rehearing in banc [718191-1] (fg)
12/9/93	71	[727019] Mandate issued. Mandate receipt due 1/10/94 (mbm)
12/9/93	72	[727291] Mandate receipt filed. (afw)
2/1/94	73	[738546] Case file closed. 2/1/96 (bpm)
4/26/94	74	[761101] Petition for writ of certiorari filed on 4/15/94 by Appellant Nicholas Brady. Supreme Court Number 93-1631. (afw)
6/17/94	75	[774276] Supreme Court order dated 6/13/94 granting certiorari filed. (pdw)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 92-1348

ADOLPH COORS COMPANY, PLAINTIFF-APPELLEE

v.

NICHOLAS BRADY, IN HIS OFFICIAL CAPACITY AS SECRETARY
OF THE UNITED STATES DEPARTMENT OF TREASURY;
STEVE HIGGINS, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF
THE BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
DEFENDANT-APPELLANTS

SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE
U.S. HOUSE OF REPRESENTATIVES,
DEFENDANT-INTERVENOR

DOCKET ENTRIES

DATE	PROCEEDINGS
11/13/92	[633648] Civil case docketed. Preliminary record filed. Transcript order form due 11/23/92 for Paul Zuckerman pursuant to R.42.1 Docketing statement due 11/23/92 for Steve Higgins, for Nicholas Brady. Notice of appearance due 11/23/92 for Speaker & Bipartisan, for Steve Higgins, for Nicholas Brady, for Adolph Coors Company. (mbm)
11/17/92	[634060] Motion filed by Appellant Nicholas Brady and appellant Steve Higgins for stay of pending appeal [92-1348]. Original and 4 copies c/s: y. (mbm)

DATE	PROCEEDINGS
11/18/92	[634781] Acknowledgement of transcript order filed by attorneys for appellants. (afw)
11/18/92	[634812] Docketing statement filed by Nicholas Brady, Steve Higgins. Original and 4 copies c/s: y. (mbm)
11/19/92	[634783] Transcript order form filed by Paul Zuckerman. Transcript due 1/19/93 for Paul Zuckerman. (afw)
11/24/92	[635858] Appellee's response Brief in opposition filed by Adolph Coors Company to Appellant/Petitioner motion for stay of proceedings pending appeal. Original and 3 copies. c/s: y (fg)
12/3/92	[639440] Appellant's motion for stay submitted to panel. (afw)
12/4/92	[638193] Notice of appearance filed by John S. Koppel, Michael J. Singer as attorney for Nicholas Brady, Steve Higgins. CERT. OF INTERESTED PARTIES (y/n): y. (pdw)
12/4/92	[638199] Reply filed by Nicholas Brady, Steve Higgins to Appellee's response to motion for stay. Original and 3 copies. c/s: y. (pdw)
12/11/92	[639774] Order filed by Judges McKay, Baldock denying Appellant's motion for stay pending appeal. Parties served by mail. (pdw)
1/4/93	[645443] Filed notice record is complete 12/31/92. Appellant/Petitioner's brief due 2/9/93 for Steve Higgins, for Nicholas Brady Appellant/Petitioner's appendix due 2/9/93 for Steve Higgins, for Nicholas Brady (afw)
1/6/93	[645069] Appellant's motion filed by Nicholas Brady, Steve Higgins to expedite case

DATE	PROCEEDINGS
	[92-1348]. Original and 3 copies. c/s: y. (pdw)
1/11/93	[646191] Appellant's motion to expedite case submitted to panel. (pdw).
1/19/93	[647763] Appellee's response to "Motion to Expedite Oral Argument" filed Adolph Coors Company. Original and 3 copies. c/s: y (mbm)
1/19/93	[647772] Response filed by Adolph Coors Company Document [647763-1] submitted to panel. (mbm)
1/28/93	[650206] Order filed by Judges Seymour, Brorby granting Appellant's motion to expedite case—"This appeal shall be set for argument the week of May 10 to 14, 1993. Absent extraordinary circumstances, no extensions of time will be granted." [645069-1] Parties served by mail. (pdw)
2/4/93	[652018] Order filed by RLH notice of appearance form due 2/16/93 for Adolph Coors Company. Parties served mail. (afw)
2/12/93	[654258] Appellant's brief filed by Nicholas Brady, Steve Higgins. Original and 7 copies. c/s: y. served on 2/9/93. Oral argument? y. Appendix filed. Original and 1 appendix copy. Appellee/Respondent's brief due 3/15/93 for Adolph Coors Company (mbm)
2/16/93	[654735] Notice of appearance filed by K. Preston Oade as attorney for Adolph Coors Company. CERT. OF INTERESTED PARTIES (y/n): n Attorney Thomas J. Carney terminated for Adolph Coors Company (afw)
2/22/93	[656196] Hearing set for May 1993 Session, at Denver. (sls)

DATE	PROCEEDINGS
3/15/93	[661924] Appellee's brief filed by Adolph Coors Company. Original and 7 copies. c/s: y. Served on 3/15/93. Oral Argument? y. Appellant's optional reply brief due 4/1/93 for Steve Higgins, for Nicholas Brady. (pdw)
3/15/93	[661932] Addendum to brief filed by Appellee Adolph Coors Company. c/s: y. (pdw)
3/16/93	[661929] Appellee's brief submitted to panel. (pdw)
3/26/93	[664317] Appellee's motion [92-1348] to file supplemental addendum filed by Adolph Coors Company. Original and 3 copies. c/s: y (mbm)
3/26/93	[685195] Supplemental Addendum to brief filed by Appellee Adolph Coors Company (SEE order of 6/15/93 granting permission to file). Original only. c/s: y. (pdw)
4/2/93	[665879] Appellee's motion to file appendix submitted to panel. (sls)
4/2/93	[666089] Appellant's reply brief filed by Nicholas Brady, Steve Higgins. Original and 7 copies. c/s: y (fg)
4/2/93	[666102] Appellant's motion "For Leave To File Supplemental Appendix" filed by Appellant Nicholas Brady, Appellant Steve Higgins [92-1348]. Original 2 copies c/s: y (fg)
4/2/93	[685196] Supplemental Appendix filed by Appellants Steve Higgins, Nicholas Brady (SEE order of 6/15/93 granting permission to file). Original and 1 copy. c/s: y. (pdw)
4/5/93	[666281] Appellant's motion for general relief (for leave to file a supplemental appendix) submitted to panel. (sls)

DATE	PROCEEDINGS
4/19/93	[670552] Appellee's supplemental authority filed by Adolph Coors Company and submitted to panel. Original and 7 copies. c/s: y (fg)
4/26/93	[672266] Appellant's response filed by Steve Higgins, Nicholas Brady to Appellee's Supplemental Authority and submitted to panel. Original and 3 copies. c/s: y (pdw)
4/28/93	[673325] Appellant's supplemental authority filed by Steve Higgins, Nicholas Brady and submitted to panel. Original and 8 copies. c/s: y (fg)
4/28/93	[673333] Appellee's supplemental authority filed by Adolph Coors Company and submitted to panel. Original and 7 copies. c/s: y (fg)
4/29/93	[673509] Appellant's settlement conference report filed. Original and 3 copies. (pdw)
5/4/93	[674685] Appellant's response to "Plaintiff's Second Supplemental Authority" filed by Steve Higgins, Nicholas Brady. Original and 3 copies. c/s: y (fg)
5/4/93	[674695] Appellant's response filed by Steve Higgins, Nicholas Brady Document [674685-1] Appellant/Petitioner response Null Relief Code filed by Appellant Steve Higgins, Nicholas Brady submitted to panel. (fg)
5/5/93	[675214] Appellee's motion "For Leave To File Record" [92-1348] filed by Adolph Coors Company. Original and 7 copies. c/s: y (fg)
5/5/93	[685202] Addendum to brief (referred to in motion to file "record," consists of 10 volumes) filed by Appellee Adolph Coors Company. Original only. c/s: y. (pdw)

DATE	PROCEEDINGS
5/11/93	[676387] Order filed by RLH referring Appellee/Respondent motion for general relief [675214-1] REFERRED TO PANEL ON THE MERITS. Parties served by mail. (fg)
5/11/93	[677205] Case argued and submitted to Judges Tacha, Barrett, Brown. (sls)
5/17/93	[677937] Appellant's response filed by Steve Higgins, Nicholas Brady to Appellee's motion for leave to file record and submitted to panel. Original and 3 copies. c/s: y. (pdw)
5/19/93	[678327] Motion to file record relief filed by Appellee Adolph Coors Company submitted to panel. (pdw)
5/21/93	[679126] Appellant's motion filed "For Leave To File Exhibits" by Appellant Steve Higgins, Appellant Nicholas Brady [92-1348]. Original and 3 copies c/s: y (fg)
5/21/93	[679128] Appellant's motion(s) Appellant/Petitioner motion for "Leave To File Exhibits" submitted to panel. One set of exhibits was filed and is being submitted with the motion to Judge Tacha. (fg)
5/21/93	[685207] Exhibits filed by Appellants Steve Higgins, Nicholas Brady (SEE order of 6/15/93 granting permission to file). Original only. c/s: y. (pdw)
6/15/93	[685178] Order filed by Judges Tacha, Barrett, Brown granting Appellee's motion to file appendix [664317-1], granting Appellant's motion to file supplemental appendix [666102-1], granting Appellee's motion for "leave to file record" [675214-1], granting Appellant's motion "for leave to file exhibits" [679126-1] Parties served by mail. (pdw)

DATE	PROCEEDINGS
6/28/93	[688314] Appellant's supplemental authority filed by Steve Higgins, Nicholas Brady and submitted to panel. Original and 3 copies. c/s: y (mbm)
8/23/93	[701222] Terminated on the Merits after Oral Hearing: Judgment is Affirmed; Written, Signed, Published. Tacha, authoring judge; Barrett; Brown. [92-1348] (afw)
10/4/93	[711548] Appellant's motion filed by Appellant Steve Higgins, Appellant Nicholas Brady to extend time to file petition for rehearing until 10/21/93 [92-1348]. Original and 3 copies. c/s: y (mbm)
10/6/93	[712161] Order filed by RLH granting Appellant/Petitioner motion to extend time to file petition for rehearing [711548-1] Parties served by mail. (mbm)
10/21/93	[716067] Appellant's motion filed by Steve Higgins, Nicholas Brady to extend time to file petition for rehearing until 11/1/93 [92-1348]. Original and 3 copies. c/s: y. (pdw)
10/26/93	[716878] Appellant's motion to extend time to file petition for rehearing until 11/1/93 submitted to panel. (pdw)
10/29/93	[717775] Order filed by Judges Tacha, Barrett, Brown granting Appellant's motion to extend time to file petition for rehearing until 11/1/93. NO FURTHER EXTENSIONS WILL BE CONSIDERED [716067-1] Parties served by mail. (pdw)
11/1/93	[718191] Petition for rehearing in banc [92-1348] filed by Nicholas Brady, Steve Higgins. Original and 14 copies. c/s: y (fg)

DATE	PROCEEDINGS
11/1/93	[718193] Document [718191-1] Petition for rehearing in banc filed by Appellant Nicholas Brady, Steve Higgins submitted to panel. (fg)
11/3/93	[718933] FIRST notice of rules violation for Michael J. Singer for Appellant Nicholas Brady, Appellant Steve Higgins (jt)
11/3/93	[718935] FIRST notice of rules violation for John S. Koppel for Appellant Nicholas Brady, Appellant Steve Higgins (jt)
12/1/93	[724642] Order filed by Judge(s) McKay, Logan, Seymour, Moore, Enderson, Tacha, Baldock, Brordy, Ebel, Kelly, Barrett, Brown denying Petition for rehearing in banc [718191-1] (fg)
12/9/93	[727019] Mandate issued. Mandate receipt due 1/10/94 (mbm)
12/9/93	[727291] Mandate receipt filed. (afw)
2/1/94	[738546] Case file closed. 2/1/96 (bpm)
4/26/94	[761101] Petition for writ of certiorari filed on 4/15/94 by Appellant Nicholas Brady. Supreme Court Number 93-1631. (afw)
6/17/94	[774276] Supreme Court order dated 6/13/94 granting certiorari filed. (pdw)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

87-CV-977

ADOLPH COORS COMPANY, PLAINTIFF

v.

JAMES BAKER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF
THE UNITED STATES DEPARTMENT OF TREASURY; AND STEVE
HIGGINS, IN HIS OFFICIAL CAPACITY AS DIRECTOR BUREAU OF
ALCOHOL, TOBACCO AND FIREARMS, DEFENDANTS

COMPLAINT

[filed July 2, 1987]

NATURE OF THE CASE

This is a constitutional challenge to certain provisions of the Federal Alcohol Administration Act, 27 U.S.C. §201, *et seq.* (hereinafter referred to as the "Act"), and to certain of its implementing regulations, insofar as they prohibit the Plaintiff from truthfully informing the public of the percentage alcohol content of fermented malt beverages on product labels and in product advertisements. This denial of Plaintiff's right to communicate accurate, independently verifiable, quantitative information on the percentage alcohol content of such beverages, and the denial of the public's right to receive such information from the Plaintiff, violates the First Amendment to the Constitution of the United States.

JURISDICTION AND VENUE

1. This Court has jurisdiction of this matter under 28 U.S.C., § 1331 and 5 U.S.C., § 702.
2. Venue is proper in this Court under the provisions of 28 U.S.C., § 1391(e).

PARTIES

3. The Adolph Coors Company is a Colorado corporation engaged in the production, sale and distribution of fermented malt beverages throughout the United States, with its principal place of business in Jefferson County, Colorado.

4. James Baker, as Secretary of the United States Treasury, is charged with the administration of the Federal Alcohol Administration Act, 27 U.S.C., § 201, *et seq.*

5. Steven Higgins, as Director of the Bureau of Alcohol, Tobacco and Firearms (hereinafter the "Bureau"), performs his duties under the general direction of the Secretary of the Treasury, and is directly responsible for the administration of the Act.

GENERAL ALLEGATIONS

6. The First Amendment to United States Constitution gives the Plaintiff the right to truthfully inform the public of the percentage alcohol content of its products and other fermented malt beverages.

7. Under pertinent provisions of the Act, Plaintiff is prohibited by law from truthfully informing the public of the alcohol content of malt beverages. Specifically, 27 U.S.C., § 205(e)(2) prohibits statements of alcohol content on labels of malt beverages unless required by state law; and § 205(f)(2) prohibits statements in advertising of

alcohol content of malt beverages unless required by state law.

8. The provisions of the Act that prohibit Plaintiff from disseminating truthful information to the public concerning the alcohol content of malt beverages are severable from the balance of the Act pursuant to 27 U.S.C. § 211(c).

9. On or about April 15, 1987, Plaintiff submitted to the Bureau applications for label approval and print and broadcast advertisements for the purpose of truthfully informing the public of the percentage alcohol content of malt beverages. That Application is attached as Exhibit A and incorporated by reference herein.

10. Plaintiff's application was denied by the Bureau on or about May 4, 1987. The denial of Plaintiff's Application is attached as Exhibit B and incorporated by reference herein.

11. The Bureau's denial of Plaintiff's application constitutes final agency action within the meaning of the Administrative Procedure Act, 5 U.S.C., § 701.

12. The Bureau refused to consider the Plaintiff's application on its merits solely because of the provisions of 27 U.S.C., § 205(e)(2) and § 205(f)(2), and implementing regulations.

13. The Bureau has previously stated in reports and testimony to Congress that public policy favors requiring public disclosure of the percentage alcohol content of malt beverages.

14. In the absence of the aforesaid prohibitions of the Act, Plaintiff would truthfully inform the public of the alcohol content of its products by stating the percentage alcohol content on product labels and in advertisements of malt beverages or, at the very least, would be entitled to have the Bureau consider the Plaintiff's label approval application on the merits.

15. The public, including the actual and potential consumers of the Plaintiff's products, have a First Amendment right to receive information on the percentage alcohol content of malt beverages and the Plaintiff desires to communicate this information.

16. The percentage alcohol content of the Plaintiff's products and other malt beverages is factual information that the actual and potential consumers of the Plaintiff's products want to know.

17. The prohibitions of the Act that prevent the Plaintiff from truthfully informing the public of the percentage alcohol content of malt beverages are not supported by a substantial government interest; nor are the prohibitions of the Act properly tailored to serve any government interest.

FIRST CAUSE OF ACTION

Review Under the Administrative Procedure Act

18. The allegations in paragraphs 1 through 17 are incorporated by reference as though fully set forth herein.

19. The Bureau's denial of the Plaintiff's application for approval of print and broadcast advertisements to truthfully inform the public of the numerical percentage alcohol content of malt beverages violates the First Amendment rights of the Plaintiff and the public and is, therefore, properly set aside by this Court under 5 U.S.C., § 706(2)(b).

SECOND CAUSE OF ACTION

Declaratory Judgment

20. There presently exists a legal case and controversy between the Plaintiff and the Defendants under 28 U.S.C. § 2201 in that:

(a) Plaintiff asserts its constitutional right to truthfully inform the public of the contents of malt beverages by stating the numerical percentage alcohol content of malt beverages on its product labels and in its product advertisements;

(b) Plaintiff asserts the constitutional right of the public, including the potential and actual consumers of the Plaintiff's products, to receive truthful information on the alcohol content of malt beverages;

(c) Pursuant to regulations issued by the Bureau, Plaintiff cannot exercise its constitutional right to inform the public of the alcohol content of its products without approval by the Bureau; and

(d) The Bureau has refused to approve label and advertisement applications submitted by Plaintiff on the sole ground that alcohol content labeling is prohibited by pertinent provisions of the Act.

21. The provisions of the Act which prohibit the Plaintiff from truthfully informing the public of the alcohol content of malt beverages are invalid under the First Amendment to the United States Constitution and this Court should so declare.

RELIEF REQUESTED

WHEREFORE, Plaintiff respectfully requests that this Court:

A. Hold unlawful and set aside the Defendants' decision refusing to process Plaintiff's application for approval of alcohol content labeling and advertising; and direct Defendants to process the Plaintiff's application on the merits;

B. Declare that the pertinent provisions of the Act that prohibit dissemination of truthful information to the public concerning the alcohol content of malt beverages

are unconstitutional on their face and as applied, insofar as they prohibit dissemination of truthful information to the public concerning numerical statements of the alcohol content of malt beverages on product labels and in advertisements;

C. Sever those provisions from the balance of the Act;

D. Permanently enjoin the Defendants from enforcing said provisions of the Act and its implementing regulations insofar as they prohibit dissemination of truthful information to the public concerning numerical statements of the percentage alcohol content of malt beverages on product labels and in advertisements; and

E. Such other and further relief as the Court deems appropriate, and in accordance with law, equity and good conscience.

Respectfully submitted,

BRADLEY, CAMPBELL & CARNEY

* * * * *

[Compl., Exhibit A, at p. 1]

[SEAL OMITTED]
Adolph Coors Company

April 15, 1987

Ms. Vicki Rennecker
Chief, Product Compliance Branch

Mr. Bruce L. Weininger
Chief, Industry Control Division
Bureau of Alcohol, Tobacco & Firearms
1200 Pennsylvania Ave., N.W.
Washington, DC 20226

RE: REQUEST FOR APPROVAL OF PRINT AND
BROADCAST ADVERTISEMENTS AND
LABEL APPROVAL APPLICATIONS 87-4
and 87-5

Dear Ms. Rennecker and Mr. Weininger:

We have become more and more convinced that there can be no meaningful public policy reason why alcohol content should not be designated on malt beverage labels and in advertising. We believe that the consuming public is badly served by prohibiting this practice as misconceptions arise as to the true alcohol content especially as compared to other products containing alcohol.

We are proposing the program represented by these items in order to provide consumers with this important information. Our intent is simply to inform. We make no claims in these ads regarding alcohol content as a product

benefit nor does our labeling draw undue attention to this statement. Our statements are nothing more than a presentation of facts we believe consumers should know. We hope the agency can consider the broader public policy implications of this issue rather than rely on an untested and time-worn statute.

These pieces are a program. We want you to consider them as a unit. Rejection of one is effectively rejection of all. Please forward your response to me at BC-540, Golden, CO 80401.

Thank you for considering our position on this issue.

Sincerely,

/s/ Timothy R. Gablehouse
TIMOTHY R. GABLEHOUSE
Managing Attorney
Regulatory Affairs

TRG:rb

pc: Tom Carney, Bradley, Campbell & Carney
Linda Christenson, Adolph Coors Company

DEPARTMENT OF THE TREASURY - BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
APPLICATION FOR AND CERTIFICATION/EXEMPTION OF LABEL/BOTTLE APPROVAL
(See Instructions and Paperwork Reduction Act Notice on Back)

PART I - APPLICATION

FOR ATF USE ONLY		NAME AND ADDRESS AND PLANT REGISTRY NO. OR BASIC PRODUCT NO. OF APPLICANT	
1. VENDOR CODE (Required)		ADOLPH COORS COMPANY GOLDEN, COLORADO 80401	
2. SERIAL NO. (Required)		84-0178360	
3. BRAND NAME (Required)		Attn: Tim Gablehouse Mail No. BC540 Adolph Coors Company Golden, CO 80401	
4. CLASS AND TYPE (Required)		Beer	
5. PRINCIPAL NAME (If Any)		Type of Application (Check Applicable Box)	
6. VINTAGE (New Only)		<input checked="" type="checkbox"/> CERTIFICATE OF LABEL APPROVAL	
7. FORMULA NO. (If Any)		<input type="checkbox"/> CERTIFICATE OF EXEMPTION FROM LABEL APPROVAL "FOR SALE IN _____ ONLY"	
8. LAB. ANALYSIS NO.		<input type="checkbox"/> DISTINCTIVE LIQUOR BOTTLE APPROVAL	
9. STATE ANY WORKED, NOT SHOWN ON LABELS (Copy, submit, etc.)		TOTAL BOTTLE CAPACITY BEFORE CLOSURE _____ (If in ounces)	

PART II - APPLICANT'S CERTIFICATION

The applicant hereby declares under the penalties of perjury that to the best of his/her knowledge and belief all statements appearing in the above application are true and correct and the representations of the labels and in the supplemental documents truly and correctly represent the contents of the containers to which such labels will be applied. Additionally, the applicant for exemption from label approval further certifies that the product will be exclusively disposed of in the State shown in Item 4b, and that each container will bear the legend "For Sale in (State shown in Item 4b.) only".

13. DATE OF APPLICATION 04/02/87
14. SIGNATURE OF APPLICANT AUTHORIZED AGENT *[Signature]* Vice President

PART III - ATF CERTIFICATE

This certificate is issued subject to applicable laws and regulations and conditions as set forth on the back of this form.

15. DATE ISSUED MAY 04 1987
16. SIGNATURE OF DIRECTOR *[Signature]* BUREAU OF ALCOHOL, TOBACCO AND FIREARMS

QUALIFICATIONS

THIS APPROVAL IS GRANTED ONLY IF STATE REQUIREMENTS FOR LABELING OR A STATEMENT OF PUBLIC COMMENT IN THE FORM SHOWN ON THE LABEL BELOW.

APPROPRIATE COMPLETE SET OF LABELS BELOW



[Complaint, Exhibit A]

EXHIBIT A

Page 2 of 5 of page(s).

DEPARTMENT OF THE TREASURY - BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
APPLICATION FOR AND CERTIFICATION/EXEMPTION OF LABEL/BOTTLE APPROVAL
(See Instructions and Paperwork Reduction Act Notice on Back)

FOR ATF USE ONLY		PART I - APPLICATION	
1. NAME AND ADDRESS AND PLANT REGISTRY NO. OR BUREAU PERMIT NO. OF APPLICANT		ADOLPH COORS COMPANY GOLDEN, COLORADO 80401	
2. TYPE OF APPLICATION (Check Applicable Box)		84-0178360	
a. <input checked="" type="checkbox"/> CERTIFICATE OF LABEL APPROVAL		Attn: Tim Gablehouse	
b. <input type="checkbox"/> CERTIFICATE OF EXEMPTION FROM LABEL APPROVAL "FOR SALE IN _____ ONLY" (Fill in State abbreviation)		Mail No. BC540	
c. <input type="checkbox"/> DISTINCTIVE LIQUOR BOTTLE APPROVAL		Adolph Coors Company	
d. <input type="checkbox"/> TOTAL BOTTLE CAPACITY BEFORE CLOSURE _____ (Fill in amount)		Golden, CO 80401	
3. STATE ANY WORKING, NOT SHOWN ON LABELS (Cans, etc.)			

PART II - APPLICANT'S CERTIFICATION	
The applicant hereby declares under the penalties of perjury that to the best of his/her knowledge and belief all statements appearing in the above application are true and correct and the representations of the labels and in the supplemental documents truly and correctly represent the contents of the containers to which such labels will be applied. Additionally, the applicant for exemption from label approval further certifies that the product will be exclusively disposed of in the State shown in Item 4b. and that each container will bear the legend "For Sale in (State shown in Item 4b.) only".	
12. DATE OF APPLICATION 04/02/87	13. SIGNATURE OF APPLICANT OR AUTHORIZED AGENT <i>[Signature]</i> , Vice President

PART III - ATF CERTIFICATE	
This certificate is issued subject to applicable laws and regulations and conditions as set forth on the back of this form.	
14. DATE ISSUED MAY 04 1987	15. SIGNATURE OF SPECIAL AGENT IN CHARGE OF ALCOHOL TOBACCO AND FIREARMS <i>[Signature]</i>

QUALIFICATIONS	TERMINATION DATE (If Any)
THIS APPLICANT IS QUALIFIED TO BE IN THE FIELD AS A SPECIAL AGENT IN CHARGE OF ALCOHOL TOBACCO AND FIREARMS IN THE FOLLOWING STATES: _____	

APPLICANT COMPLETE SET OF LABELS BELOW



FCB

DATE: July, 1985

CLIENT: Adolph Coors Company
PRODUCT: Coors Premium
FILM NO.: YCPP5243
FILM TITLE: "Bandwagon"

FILM LENGTH: :30

64



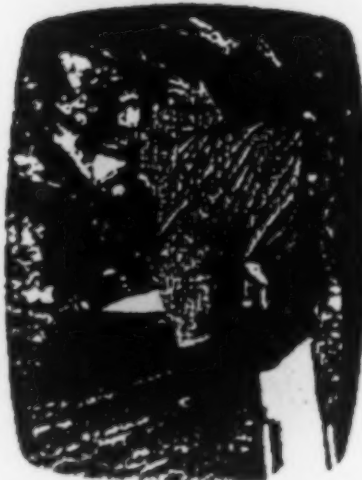
1. (NATURAL OUTDOOR SFX
UP AND UNDER)



2. MARK HARMON: Y'know, I've
been a beer drinker for a bunch of
years.



3. And, like you, I've seen a lot of
beer commercials.



4. But there's one beer people loved
before it was even advertised.



5. Y'see, Coors was kind of the beer
at my folks' place.



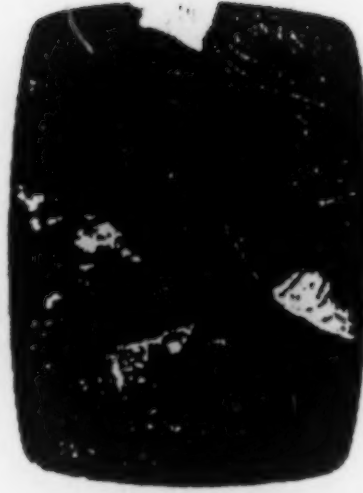
6. People thought it was different...
special.



7. And that was true long before
there were any jingles or promotions.



8. (SFX: POP)



9. It's the product people love, not
the hoopla.



10. You think about that.



11. How many products can you
say that about?



12. Coors is the one.

[Complaint, Exhibit A]

4 of 5 =

COUNT ON COORS FOR THE FACTS

59



BRAND	ALCOHOL CONTENT BY VOLUME*
Bud Light (108 calories)	3.56%
Coors Light	4.12%
Miller Lite	4.12%
Budweiser	4.67%
Coors	4.73%
Miller High Life	4.53%
Miller Genuine Draft	4.61%
Old Style	4.91%
Stroh's	4.31%
Michelob	4.78%
Herman Joseph's	4.75%
Heineken	4.97%
Corona	4.42%

*Independent Laboratory Analysis

This message courtesy of the Adolph Coors Company
© 1987 Adolph Coors Company, Golden, Colorado 80401 - Brewer of Fine Quality Beers Since 1873

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 87-Z-977

ADOLPH COORS COMPANY, PLAINTIFF

v.

JAMES BAKER, SECRETARY OF THE TREASURY, AND
STEVEN HIGGINS, DIRECTOR, BUREAU OF ALCOHOL,
TOBACCO AND FIREARMS, DEFENDANTS

[Filed July 31, 1992]

AMENDED ANSWER

Defendants Nicholas Brady and Steven Higgins, through their undersigned counsel, file the following, amended, answer to plaintiff's Complaint:

Unnumbered Paragraph. The allegations set forth in the unnumbered paragraph of the Complaint entitled "Nature of the Case" contain conclusions of law and not averments of fact to which an answer is required. To the extent that an answer is deemed required, the allegations are denied.

1. Admitted.
2. Admitted.
3. Admitted.
4. The allegations of paragraph 4 of the Complaint are admitted, except to deny that James Baker currently serves as Secretary of the United States Treasury. Nicholas Brady

currently serves as Secretary of the Treasury.

5. Admitted.

6. The allegations of paragraph 6 of the Complaint contain conclusions of law and not averments of fact to which an answer is required. To the extent that an answer is deemed required, the allegations are denied.

7. Paragraph 7 of the Complaint contains plaintiff's characterizations of 27 U.S.C. § 205 and not averments of fact to which an answer is required and defendants respectfully refer the Court to that statute for a full statement of its contents.

8. Admitted.

9. Admitted that plaintiff submitted the applications referred to in this paragraph on or about April 15, 1987. Defendants are without knowledge sufficient to admit or deny the remainder of this paragraph.

10. Admitted.

11. Paragraph 11 of the Complaint contains conclusions of law and not averments of fact to which an answer is required. To the extent that an answer is deemed required, the allegations of paragraph 11 are denied, except to admit that no further administrative action is required for plaintiff's application for label approval and that no formal administrative procedure exist for approval of advertising.

12. Denied, except to admit that plaintiff's applications were denied under 27 U.S.C. § 205(e)(2) and (f)(2).

13. Denied, except to admit that the Bureau of Alcohol, Tobacco and Firearms has previously stated that it favored allowing labeling which disclosed the alcoholic content of malt beverages.

14. Defendants are without sufficient information to admit or deny the allegations of this paragraph, except to admit that plaintiff applied for permission to use labels and advertisements containing statements regarding the

alcoholic content of their products and that the Bureau of Alcohol, Tobacco and Firearms considers all applications for compliance with legal requirements.

15. Paragraph 15 of the Complaint contains conclusions of law and not averments of fact to which an answer is required. To the extent that an answer is deemed required, the allegations are denied, except that defendants are without sufficient information to admit or deny the allegation that plaintiff "desires to communicate [alcohol content] information."

16. Defendants are without sufficient information to admit or deny the allegations of this paragraph, except to admit that the percentage of alcohol in malt beverages is factual information.

17. Paragraph 17 of the Complaint contains conclusions of law and not averments of fact to which an answer is required. To the extent that an answer is deemed required, the allegations are denied.

18. Defendants' answers to plaintiff's unnumbered paragraph entitled "Nature of the Case" and to paragraphs 1 through 17 are incorporated by reference.

19. Paragraph 19 of the Complaint contains conclusions of law and not averments of fact to which an answer is required. To the extent that an answer is deemed required, the allegations are denied.

20. Subparagraphs (a) and (b) of paragraph 20 contain plaintiff's characterization of this action and not averments of fact to which an answer is required. Subparagraph (c) contains plaintiff's characterization of the regulations contained in 27 C.F.R. Part 7, and defendants respectfully refer the Court to those regulations for a full statement of their contents. Subparagraph (d) is admitted.

21. Paragraph 21 of the Complaint contains conclusions of law and not averments of fact to which an answer is required. To the extent that an answer is deemed required, the allegations are denied.

The remainder of the Complaint contains plaintiff's characterization of the relief requested and not averments of fact to which an answer is required.

Respectfully submitted,

STUART M. GERSON
Assistant Attorney General

MICHAEL J. NORTON
United States Attorney

WILLIAM G. PHARO
Assistant United States Attorney

/s/ _____
SANDRA M. SCHRAIBMAN

/s/ _____
PATRICIA M. RUSSOTTO

/s/ _____
ROBIN S. ROSENBAUM

Department of Justice
Civil Division
901 E Street, N.W., Room 912
Washington, D.C. 20530
Telephone: (202) 514-4470
Telecopier: (202) 616-8202

Attorneys for Defendants

[GUNDEE DEPOSITION, EXHIBIT 1]

AFFIDAVIT

HOWARD N. GUNDEE being duly sworn deposes and says as follows:

1. I am making this affidavit concerning a survey titled "Beverage Study" prepared for Bradley, Campbell & Carney which reports upon the results of interviews conducted by telephone with consumers in the United States and Canada during May and June, 1987.

2. I reside at 2636 Summit, Highland Park, Illinois and am Senior Vice-President and a Principal in C/J Research, Inc., a marketing research organization which conducts surveys dealing with a variety of subjects.

3. Prior to joining C/J Research, Inc. in March, 1985, I was employed by Elrick and Lavidge, Inc., one of the largest marketing research organizations in the country, at which company I served as a Project Director, and as Vice President and Account Supervisor.

4. I have a Bachelor of Business Administration degree from the University of Miami with a major in marketing and have worked in the marketing and research survey field since 1969.

5. During my employment, I have conducted and/or supervised hundreds of surveys, specializing in surveys of the type undertaken and reported on in this Affidavit.

6. I personally designed the survey reported upon in this Affidavit and supervised all phases of its conduct.

7. The survey was conducted utilizing professionally accepted methodologies for surveys of this type and is the type of survey routinely relied upon by marketing professionals for important business decisions. If this study were repeated one hundred times, 95 times out of 100 we would expect the results in each study to be within 5 percentage points of the results shown in the report.

8. To the best of my knowledge all statements made in the report of findings are true and accurate.

/s/ _____
HOWARD N. GUNDEE

[Notary subscription omitted]

RESEARCH PROCEDURE

In order to better understand the results, surveys were conducted in the U.S. and in Canada. Beer sold in Canada lists alcohol content. Therefore, by conducting studies in both countries, it is possible to investigate the differences, if any, in knowledge and attitudes attributable to alcohol content labeling.

For the United States portion of the study, a total of 500 interviews were conducted with consumers (250 women and 250 men) between May 12th and May 24th, 1987. The interviews were conducted via long distance telephone lines from a centrally monitored telephone interviewing facility using a national probability sample which included telephone numbers for the forty-eight contiguous states within the United States (excluding Alaska and Hawaii).

For the Canadian survey, a total of 500 interviews were conducted with consumers (250 women and 250 men) between June 16th and June 20th, 1987. The interviews were conducted at the same interviewing facility as the United States interviews. A probability sample was used which included telephone numbers for the following Canadian provinces: Alberta, British Columbia, Manitoba, Ontario, Saskatchewan, and Quebec.

The samples used in this study are random samples which are computer generated. Samples of this nature ensure that unlisted telephone numbers and recently issued numbers will be included in the interviewing process.

For each interview, the interviewers were instructed to speak with a male in the household who had the most recent birthday and who was of legal drinking age (for *that* particular state or province) or older, (Colorado and Canadian provinces—18 years, Ohio and Wyoming—19 years, all other states—21 years). If this person was unavailable, the interviewers were instructed to speak to a

female in the household who had the most recent birthday and was of legal drinking age or older. This further serves to randomize the interviewing procedure.

Because some areas of Canada are predominantly French, two specialists were trained to interview French-speaking respondents.

In order to participate, respondents had to meet a number of criteria. All respondents in the study were legal drinking age or older, and reported that they had consumed beer during the previous month.

People were excluded from participation if they were a member of a family or have a close friend who worked for an advertising agency, a marketing research firm, or a manufacturer, distributor, or retailer of beverage products.

Respondents who qualified for the study were asked, "You mentioned a moment ago that you have recently had beer to drink. What brand of beer do you drink most often?" If regular or light beer was not specified, the respondents were asked "Is that (*BRAND*) regular or light you drink most often?"

Next, the interviewers asked, "You mentioned that (*BRAND*) is the brand of beer you drink most often. Do you know the approximate percent alcohol content of this brand?" All consumers who responded "yes" to this question were further queried, "What is the approximate percent alcohol content of (*BRAND*)?" The response was recorded exactly as was stated by the respondent.

Following this, the interviewers prepared to read a list of beer brands by saying, "Now I will read the names of some brands of beer and would like you to tell me what is the approximate percent alcohol content for each brand. What is the approximate alcohol content of (*BRAND*)?" The list of beers about which United States respondents were questioned is as follows: Regular Budweiser, Miller

High Life, Regular Coors, Michelob, Heineken and Miller Lite.

The Canadian respondents were queried about the following list of beers: Labatt's Blue, Molson Canadian, O'Keefe Ale (Quebec province only) Old Vienna (All provinces except Quebec), Labatt's Blue Light and Molson Light. Of course, the order in which the beers were read was rotated to control order bias. If the brand of beer which the respondent stated he or she drinks most often was included in the brand list, the respondent was not asked about it again.

Once this was accomplished, the respondents were asked, "Do you yourself, feel that the alcohol content of beer should or should not be shown on the bottle or can?" They then were asked, "Why do you say that?" The response was recorded exactly as stated by the respondent.

Finally, all respondents who said that the alcohol content of beer should be shown on the bottle or can were asked, "Other than just curiosity, why would you want to know the alcohol content of the beer you drink?" Again, the response was recorded exactly as stated.

SUMMARY OF KEY FINDINGS

- As compared to beer drinkers in the United States, beer drinkers in Canada exhibit significantly greater levels of knowledge (both perceived and actual) about the approximate alcohol content of beer and the beers they drink most often.
 - In Canada more than seven out of ten beer drinkers (72.2%) claimed to know the alcohol content of the beers they drink most often. Less than one-third (31.1%) of the beer drinkers interviewed in the U.S. claimed this knowledge.

- Nearly seven out of ten beer drinkers in Canada (68.6%) actually knew the approximate content of the beer they drink most often while less than one in four (22.6%) U.S. beer drinkers were correct in their approximations. (NOTE: Responses ranging from 2% to 6% alcohol content have been counted as a correct approximation.)
- Among those beer drinkers in the U.S. and Canada claiming to know the approximate alcohol content of the beers they drink most, the proportions giving correct approximations are more comparable but still significantly higher among the beer drinkers in Canada (72.9% — U.S.; 95% — Canada).
- When questioned about brands of beer other than the brands they drink most often, similar findings were noted. In the U.S., approximately one-fourth (21.0% to 28.6%) of the respondents mentioned alcohol content levels considered correct. In Canada, the proportions of respondents mentioning levels considered correct range from 63.2% to 67.6%.
- More than eight out of ten respondents in both the U.S. and Canada (82.6% and 87% respectively) feel the alcohol content of beer should be shown on the bottle or can.
 - The primary reasons for wanting to know this information are similar in both countries and relate to a desire on the parts of many respondents to know what they are drinking. Other reasons mentioned include the use of this information to avoid drinking too much or to know when not to drive if they have had too much to drink.
- If these studies were repeated one hundred times, 95 times out of 100 we would expect the results in each study to be within 5 percentage points of these figures.

TABLE 1

Q.2a. YOU MENTIONED THAT (BRAND Q. 1A) IS THE BRAND OF BEER YOU DRINK MOST OFTEN. DO YOU KNOW THE APPROXIMATE ALCOHOL CONTENT OF THIS BRAND?

	UNITED STATES	CANADA
Total Number of Respondents	(500)	(500)
Yes	31.1%*	72.2%*
No	63.1	21.6
Don't Know/Not Sure	<u>5.8</u>	<u>6.2</u>
	100.0%	100.0%

*ALCOHOL CONTENT SUMMARY (Q.2B)

— Among those respondents who said "yes" to Q.2A —

	UNITED STATES	CANADA
Less than 2%	1.3%	0.0%
2 to 6%	72.9	95.0%
Over 6%	25.2	5.0
Don't Know/Not sure	<u>0.6</u>	<u>—</u>
	100.0%	100.0%
BASE:	(155)	(361)

TABLE 2
Q.2B/3 WHAT IS THE APPROXIMATE PERCENT ALCOHOL CONTENT OF (BRAND RESPONDENT DRINKS MOST OFTEN/BEGIN WITH X'D BRAND)?

	UNITED STATES	Less than 2 Percent	2 to 6 Percent	More than 6 Percent	Don't Know/Not Sure*	Number of Respondents
Brand Consumed Most Often**		0.4%	22.6%	7.8%	69.2%	(500)
Regular Budweiser		1.0	26.8	13.6	58.6	(500)
Miller High Life		1.4	28.2	13.0	57.4	(500)
Regular Coors		1.2	27.6	13.2	58.0	(500)
Michelob		0.8	26.2	13.8	59.2	(500)
Heineken		0.8	21.0	16.0	62.2	(500)
Miller Lite		1.0	28.6	10.4	60.0	(500)
CANADA						
Brand Consumed Most Often***		0.0%	68.6%	3.6%	27.8%	(500)
Labatt's Blue		0.2	67.6	5.8	26.4	(500)
Molson Canadian		0.2	65.2	6.0	28.6	(500)

O'Keefe Ale/Old Vienna	0.4	63.2	3.8	32.6	(500)
Labatt's Blue Light	0.4	65.8	2.4	31.4	(500)
Molson Light	0.4	64.6	1.8	33.2	(500)

* Includes respondents who said "No" or "Don't Know/Not Sure" when asked Q. 2A "You mentioned that (BRAND Q.1A) is the brand of beer you drink most often. Do you know the approximate percent alcohol of this brand?"

** All "Most Often" brands are included in this row including: Regular Budweiser, Miller High Life, Regular Coors, Michelob, Heineken, and Miller Lite.

*** All "Most Often" brands are included in this row including: Labatt's Blue, Molson Canadian, O'Keefe Ale, Old Vienna, Labatt's Blue Light, and Molson Light.

TABLE 3

Q.4A. DO YOU, YOURSELF, FEEL THAT THE ALCOHOL CONTENT OF BEER SHOULD OR SHOULD NOT BE SHOWN ON THE BOTTLE OR CAN?

	UNITED STATES	CANADA
Total Number of Respondents	(500)	(500)
Should be shown	82.6%	87.0%
Should not be shown	3.2	1.8
Don't Know/Not Sure	14.2	11.2
	100.0%	100.0%

TABLE 4

Q.4B WHY DO YOU SAY THAT?*

(By answer to Q. 4A)

	Should be Shown		Should Not Be Shown	
	USA (413)	CAN (435)	USA (16)	CAN (9)
TOTAL NUMBER OF RESPONDENTS				
AMOUNT OF ALCOHOL CONTENT AND DRINKING ISSUES - NET	59.6%	63.9%	6.3%	-
(Will/Would know what you are drinking; Will/Would know alcohol content you are drinking; Should know amount of alcohol/what you are drinking)				
INFORMATION ISSUES - NET	16.2	18.4	-	22.2
(For information purposes; other alcoholic beverages show content)				
CONSUMER CONCERNS - NET	5.6	9.0	-	-
(Drinking and driving mentions; health Mentions)				

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DOESN'T MATTER/NOT INTERESTED				
NO PARTICULAR REASON - NET				
OTHER - NET				
Miscellaneous Mentions	1.7	0.7	43.8	33.3
Don't Know	1.7	0.9	18.8	22.2
	9.9	6.2	25.0	11.1
	5.3	0.9	11.1	12.7

See appendix for additional detail

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TABLE 5

Q.4C OTHER THAN JUST CURIOSITY, WHY WOULD YOU WANT TO KNOW THE ALCOHOL CONTENT OF THE BEER YOU DRINK?

—ASKED AMONG THOSE RESPONDENTS WHO SAID THE ALCOHOL CONTENT OF BEER SHOULD BE SHOWN (Q. 4A)

	UNITED STATES	CANADA
NUMBER OF RESPONDENTS	(413)	(434)**
AMOUNT OF ALCOHOL — CON- TENT AND DRINKING ISSUES — NET)	39.7%	39.6%
(Will/Would know what you are drinking; Let people know how much they can drink; Would know alcohol content you are drinking)		
CONSUMER CONCERNS — NET	17.4	22.8
(Drinking and driving mentions; health mentions)		
DOESN'T MATTER/NOT IN- TERESTED/NO PARTICULAR REASON — NET	15.7	10.8
INFORMATION ISSUES — NET	11.4	11.5
(For information purposes; compare different beverages, brands; Would help in selecting the beer to drink)		

TABLE 5 — Continued

	UNITED STATES	CANADA
OTHER — NET	9.4	5.1
Miscellaneous Mentions	3.1	4.8
Don't Know	3.1	5.5

* See appendix for additional detail.

** One respondent refused to answer the question.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-Z-977

ADOLPH COORS COMPANY, PLAINTIFF

v.

JAMES BAKER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF
THE U.S. DOT, ET AL., DEFENDANTS

Washington, D.C.
Monday, June 1, 1992

* * * * *

[5] PROCEEDINGS

Whereupon,

DANIEL R. BLACK,

business address at 650 Massachusetts Avenue, N.W.,
Washington, D.C., was called as a witness by counsel for
Plaintiff, and having been duly sworn by the Notary
Public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR PLAINTIFF

BY MR. OADE:

Q. This is the deposition of Mr. Dan Black, taken pursuant to Notice of Deposition under Rule 30 of the Federal Rules of Civil Procedure. The deposition may be used for any purpose permitted by Rule 32 of the Federal Rules.

I believe the witness has been sworn; is that correct?

A. That's correct.

* * * * *

[6] Q. Are you familiar with the purpose of today's [7] deposition?

A. I believe I'm familiar with it.

Q. You understand that I represent the Adolph Coors Company in some litigation against the Bureau of Alcohol, Tobacco and Firearms?

A. I understand that.

Q. And I'm here to get some information from you to find out about your views and hopefully the views of the agency concerning the matters of controversy. Do you understand that?

A. I understand.

* * * * *

Q. Okay. I would like to start just by getting an idea of your background; for example, how long you've been with the Bureau of Alcohol, Tobacco and Firearms?

A. I started in 1967. At that time we were the Internal Revenue Service.

Q. And what position did you start in the agency?

A. As an inspector.

Q. And what position do you hold?

[8] A. It's a dual position, deputy director and associate director for compliance operations.

Q. Who do you report to?

A. To the director.

Q. Mr. Higgins?

A. Steve Higgins.

Q. Are you in a policymaking function at the Bureau?

A. Yes, I am.

Q. Do you ever speak on behalf of the Bureau before Congress?

A. I have.

Q. Before committees of Congress?

A. Committees of Congress, that's correct.

Q. And are you familiar and do you have input into the agency's policies on its various regulatory functions with regard to alcohol regulation?

A. Yes, I do.

Q. How long have you held your current position?

A. I'm going to say—let me look up here. Since the 12th of June of '89.

Q. And that's your diploma on the wall that says [9] deputy director?

A. That's the one. There's the one for the other title.

Q. Okay. Is there a difference between deputy director and associate director for compliance?

A. It's the same position essentially. We have two deputy directors and they function with the director in formulating policy for the entire organization. Then the other title, associate director for compliance, handles just the compliance operations part of the organization.

Q. Okay. Now, if the agency received a complaint on alcohol labeling or advertising, would that come under your jurisdiction?

A. Yes, it would.

Q. And would that complaint ultimately come to your attention in some fashion?

A. Sometimes yes, sometimes not. Depends on whether it's resolved at a lower level.

* * * * *

[10] Q. Since 1962 have you been involved in alcohol compliance and regulation here at the Bureau?

A. You said '62. I didn't start until '67.

Q. I'm sorry. '67. I misspoke.

A. And then the question was?

Q. Since that time, 1967, have your efforts at the Bureau and duties been primarily in the area of alcohol regulation and compliance with existing law?

A. That's correct, yes.

Q. So you have 25 years' experience in this field?

A. That's correct.

Q. And during those 25 years have you become familiar with the brewing industry?

A. I would say pretty familiar.

[11] Q. Would that include the brewing industry not just in the United States but also in Canada and throughout the world?

A. Certainly to a lesser extent in Canada or the rest of the world, just a very general knowledge.

Q. You are familiar, I would assume, with the existing laws and regulations that regulate alcohol content labeling and advertising?

A. I'm pretty familiar with it.

Q. And you're aware that the current federal law prohibits brewers from placing on their label any type of information concerning the alcohol content of the product, is that correct?

A. That's correct.

Q. And you're also familiar with the regulations by the Bureau that implement those laws, is that correct?

A. That's correct.

Q. And you're aware, I assume, that one of the purposes, in fact, the primary purpose of this lawsuit is to challenge those laws in certain particulars, is that correct?

A. That's correct.

[12] Q. And you have been at the Bureau since this litigation started, correct?

A. Yes.

Q. Would you agree, Mr. Black, that the current law prevents consumers from knowing the alcohol content of malt beverages?

A. Would I agree that it prevents consumers.

Q. Let me ask you a slightly different question. That's kind of a broad question, maybe a little unfair.

Are you aware that brewers in the United States on occasion get requests from consumers for the alcohol content of the products?

A. I'm sure they do, yes.

* * * * *

[15] Q. Mr. Black, do you have information—does the [16] ATF have information on the alcohol content of individual beverages malt beverages?

A. No, we don't keep that information.

Q. So if an ordinary consumer called your agency and asked you for product information on alcohol content of individual brands of malt beverages, you would not be able to answer their question?

A. That's correct. We would not be able to.

* * * * *

[24] Q. That's a fair statement, thank you. Consumers, because of the current state of the law, are not told generally the alcohol content information in malt beverages, are they?

A. That's fair, yes. In other words, there's a prohibition against advertising and labeling.

[25] Q. Yes. And if you can't get that information on the product label and you can't get it in advertising, how would the consumer get this information?

A. I couldn't tell you because I don't—I just don't see it happen that often. I don't know how they get it.

Q. During the course of this lawsuit I was contacted by a researcher of alcohol studies at Brown University who informed me, and I'm going to ask you a question about this, who informed me in kind of a joking manner that it was easier to get information on deep sea ocean temperatures than it was to get alcohol content information on malt beverages. Would you agree or disagree with that statement?

A. No way could I agree or disagree. I don't know anything about ocean temperatures.

Q. But certainly you would agree that alcohol content product information is not readily available to consumers in this country, is it?

A. I would say probably not readily available.

* * * * *

[27] Q. Are you aware, Mr. Black, that Canada requires the labels in all ads of malt beverages to disclose the alcohol content of the product?

A. I've heard that. I'm assuming that that's probably a requirement.

Q. Has the ATF ever looked at the Canadian experience to determine what, in fact, that has had in Canada whether it be a positive effect or negative effect from a public policy standpoint?

A. No, not that I know of that.

Q. Are you aware generally, Mr. Black, that most western countries—I'm speaking of Europe and the European Community—require that consumers be informed of the alcohol content of malt beverages?

A. I'm aware of it.

[28] Q. Has the agency as a policy matter ever looked at the experience of other western countries to determine whether that requirement that consumers be told the

alcohol content of the product has negative or positive consequences from a public policy standpoint?

A. No, we've never looked into that.

Q. At one point there was some legislative action or proposed legislative action on requiring alcohol content disclosures on product labels of malt beverages. Are you aware of that?

A. No, I'm not specifically.

Q. I have a letter here that Mr. Higgins, not signed, but stamped, I assume the original is signed with a copy to you which describes some proposed legislation in Congress. I have a hard time reading the date of this letter. It's not a very good copy, and it's the only one I received in discovery. But it describes the proposed legislation, and then it has the ATF position on the second page. I'll ask you if you could take a look at that, and then I'll ask you some questions about it and maybe you could help me with the date.

A. '86.

* * * * *

[29] Q. Okay. This July 1986 letter is to the director of the Office of Legislation and Regulations from the director of the Bureau of Alcohol, Tobacco and Firearms, is that correct?

A. That's correct.

Q. And the subject is legislative request on, it appears to be Senate Bill 2595, is that correct?

A. If that's what it says. S 2595.

Q. S 2595?

A. Yes.

Q. Does that refer to a number of a senate bill?

A. I believe that's the case.

[30] Q. It says on the second page, and I'll quote, ATF supports the disclosure in both the labeling and advertising

of malt beverages of their alcohol content period. However, comma, we would recommend, comma, in view of certain technical considerations, comma, that Section 10 of the bill will be revised, period, close quote. Do you see that?

A. I see that.

Q. Is that an accurate statement of the position of the ATF in July of 1986?

A. I can't disagree with that.

Q. Okay. So as of July 1986, the ATF did support the disclosure in both the labeling and advertising of malt beverages of the alcohol content?

A. That's correct.

Q. And is that the agency's position today, if you know?

A. If that was our position, then I'm going to say that's still our position today. If, in fact, a request was made to us as to proposed legislation, we wouldn't be opposed to it.

* * * * *

[31] Q. Are you aware that current regulations prohibit both descriptive statements concerning the alcohol content of malt beverages and also purely factual information on the percentage of alcohol in the product, is that correct?

A. That's correct.

Q. Okay. Are you aware, Mr. Black, that the regulations challenged by Coors in this lawsuit pertain only to the prohibitions of giving consumers factual information on the alcohol content of the product stated in numerical terms subject to appropriate regulations by [32] the Bureau of Alcohol, Tobacco and Firearms?

A. That's my general understanding.

Q. Okay. You understand that this litigation does not challenge in any way the agency's ability or the law's

ability to regulate descriptive statements of alcohol content that tout the alcohol content of the product; do you understand that?

A. That's my general understanding, yes.

Q. Is that a significant distinction in your mind as a government regulator?

A. That's hard to say. You know—

Q. Well, let me ask you another question. Could the Bureau of Alcohol, Tobacco and Firearms regulate advertising that tout the alcohol strength of the product; could that be regulated while at the same time information be given to consumers concerning the percentage of alcohol content?

A. If the legislation was specific enough to allow that regulation to be put into effect, yes, we could do that.

* * * * *

[36] Q. Okay. As a matter of public policy, do you find anything objectionable about giving consumers that [37] information in this ad?

A. Well, only to the extent that it's prohibited as a matter of public policy. We're obligated to follow the FAA Act, both the legislation and the regulation, so I really can't say.

Q. Okay. Would the same be true of disclosing that type of alcohol content information on the label, a simple statement, contains 4.6 percent alcohol by volume; do you find anything objectionable as from an enforcement standpoint?

A. Well, only to the extent that it's prohibited.

Q. Okay. Let's talk about enforcement for a moment, Mr. Black. There have been a number of enforcement actions by your agency directed against brewers that have tried to market the alcohol content of their product, is that correct?

A. There have been a few.

Q. Okay. And the ones that come to mind are the, quote, Powermaster, unquote, ads that I believe dealt with—do you recall what brewer that was?

A. Heilman.

Q. Heilman?

[38] A. Right.

Q. And then there's the St. Ides, I-d-e-s, ad. What was that about? Do you recall that?

A. St. Ides is a malt liquor that is brewed by Heilman under contract from, I forget the name of the company, some small wholesaler, I believe. The St. Ides case involved a variety of things, but one of the things was that they advertised that it's number 1 strong.

* * * * *

[39] Q. Isn't it true, Mr. Black, that in regulating against attempts to market malt beverages based on alcohol content through such statements as Powermaster or strong or lightning, that the agency uses the regulations that prohibit such descriptive statements referring to alcohol content?

[40] A. That's correct.

Q. Okay. The agency has not relied upon the separate part of the regulation that prohibits the disclosure of alcohol content information through the use of simple numbers?

A. I'm not sure I understand the question.

* * * * *

Q. Let me hand you a copy of 27-CFR, and I'll refer you specifically to 27-CFR.29 (F) and (G) which I have highlighted for you.

A. Which you're in part 7 so it's 27-CFR 7, correct, 7.29?

MS. RUSSOTTO: 7.29.

MR. OADE: Yes, that's correct, 7.29 (F) and (G).

* * * * *

[41] Q. Have you reviewed those two separate subsections (F) and (G)?

A. I just did.

Q. Okay. Let me ask you a question. Subsection F 7.29, Subsection F, prohibits the use of descriptive words that refer to alcohol content. It says, quote, Likely to be considered as statements of alcoholic content, unquote, correct?

A. Correct.

Q. That would include the Powermaster compliance effort by the Bureau, correct?

A. Correct.

Q. That would include any attempt by a brewer to market their product based on alcohol strength by saying strong or dynamite or lightning or any type of those words, is that correct?

A. That's correct.

Q. Then you have a separate regulation, 7.29 (G), that deals not with descriptive words that tout alcohol content, but with disclosures through the use of [42] numericals like 4.6 percent alcohol by volume, correct?

A. That would be the way I would interpret that section of the regulations.

* * * * *

[43] THE WITNESS: Let me try to clarify something here. I'll give you our interpretation, that both (F) and (G) really apply to something other than purely putting the alcohol content down in the form of numerals. When you talk about (G), what we're saying there is—that you can't put down 4.5 percent alcohol. We know that. But you

couldn't also put it on there in another fashion. You get my point? What it's also saying in there is you can't also try to put it on there in some other way like a character or figure or —

Q. Roman numeral?

A. Right. If you can't put it on legally, 4.5, you can't try to somehow disguise it, and both of those really mean the same thing, so you couldn't say if the court struck this down and left this, that's not sufficient in my opinion to allow you to still put alcohol content. This was just another section to keep brewers from finding a way around putting alcohol content on it.

[44] Q. All right. So would it be a fair statement to say in drafting these regulations the ATF is regulating both against direct disclosures of alcohol content and indirect disclosures of alcohol content?

A. That's correct.

Q. Okay. And certainly the agency would be capable in the regulatory setting of distinguishing between direct product disclosures on the one hand and indirect product disclosures on the other hand that tout the alcohol content of the product?

A. I would say yes.

* * * * *

[47] Q. In 1989 the agency saw the need to publish regulations concerning low-alcohol malt beverages, correct?

A. Correct.

Q. Do you recall what that particular need was?

A. As I recall, the concern was attempting to clarify for consumers' products that were totally alcohol-free versus those that had trace amounts of alcohol.

Q. Okay. I think that's correct. And let me show you a letter from an attorney to your agency dated December 17,

1987 concerning a consumer who suffered personal injuries as a result of ingesting, quote, [48] alcohol-free beer, unquote, that, in fact, had alcohol in it, and ask you if you recall that and similar types of incidents?

A. Okay. I'm familiar with this. Your question about similar incidents?

Q. Yes. What happened here apparently with this consumer by the name of Ignacio Castako, I-g-n-a-c-i-o, C-a-s-t-a-k-o. Apparently he was an alcoholic who picked up a bottle of beer labeled alcohol-free assuming that it didn't have any alcoholic in it, correct?

A. I'm not sure.

Q. Is he saying alcohol-free or no alcohol?

A. Okay. No—okay, alcohol-free.

Q. And the consumer, according to that letter, if it said alcohol-free, assumed it was no alcohol?

A. Right.

Q. That wasn't true, was it?

A. Evidently not.

* * * * *

[49] Q. Okay. The consumer was confused because it said alcohol-free, and that wasn't true, correct?

A. Correct.

Q. All right. I have another letter here from Mr. Frank Annunzio, A-n-n-u-n-z-i-o, member of Congress, who was contacted subsequently by Mr. Greg Lonis, L-o-n-i-s, and he writes your agency indicating that that consumer is confused over the term nonalcoholic. Do you recall getting that letter? And I will also hand you a copy of the agency's response.

A. Okay.

Q. My question is were those the type of concerns that led the agency to see the need for some type of regulation in the area of low alcohol or nonalcoholic malt beverages?

[50] A. Yes, that's correct.

Q. Okay. Apparently what was happening is brewers were putting things like nonalcoholic on their product and consumers didn't know what that meant, correct?

A. Right.

Q. And they were putting alcohol-free on their product, and consumers didn't know what that meant, correct?

A. Right.

Q. Would you agree, Mr. Black, that the problem with the low alcohol could have also been resolved by simply disclosing a percentage of alcohol content of the product?

MS. RUSSOTTO: I object. I think that calls for speculation. You can answer the question.

THE WITNESS: That could be. I don't know. It's hard to say.

BY MR. OADE:

Q. Okay. Would you agree that there's two types of information consumers could receive about the product; one is descriptive terms such as nonalcoholic or strong, and the other is factual information concerning the [51] actual alcohol content by volume?

A. Yes.

Q. Those are two types of information?

A. Sure.

* * * * *

Q. Now, when the agency was responding to the need for alcohol product information in the low-alcohol beers or malt beverages, the agency chose to go with descriptive words rather than a statement percentagewise of the alcohol content by volume, correct?

[52] A. No, I don't believe that's the correct way to state that. The descriptive terms were already there. And

the agency chose to avoid further misleading information by clarifying the descriptive terms.

Q. By defining them?

A. We defined them.

Q. By saying nonalcoholic means less than .5 percent alcohol, correct?

A. Correct.

Q. Is that information placed on the label?

A. That is, yes.

Q. Okay. So now a consumer who picks up a bottle of malt beverage labeled, quote, nonalcoholic won't be misled because they know it contains less than .5 percent alcohol, correct?

A. Right.

Q. So in order to avoid misleading the consumer the agency deemed it appropriate to give that consumer information about the alcohol content expressed as a percentage of alcohol by volume, correct?

A. I'm not — no, I don't believe that's the case.

Q. Well, how did you do it?

[53] A. We defined essentially what the descriptive statements meant.

Q. Well, according to your regulation, 7.6 I agree you defined what the statement meant and the way you defined is by reference to the percentage of alcohol by volume?

A. Yes.

Q. Okay. So the agency apparently believes that expressing the alcohol content of the product through a percentage of alcohol by volume gives the consumer reasonably accurate information far more accurate than simply a descriptive term such as nonalcoholic, correct?

A. Only as it refers to nonalcoholic or the alcohol-free?

Q. Correct.

A. Right.

* * * * *

[54] MR. OADE: I will read into the record definitions of the entire section from 37 CFR 7.26 on alcoholic content.

(A) The alcoholic content and the percentage and quantity of the original extract shall not be stated unless required by state law. When alcoholic content is required to be stated that the manner of statement is not specified in the state law, it shall be stated in percentage of alcohol by weight or by volume and not by proof or any maximums or minimums, otherwise in the manner of statement shall be specified in the state law.

(B) The terms, quote, low alcohol, unquote, or, [55] quote, reduced alcohol, unquote, may be used only on malt beverage products containing less than 2.6 percent alcohol by volume.

(C) The term, quote, nonalcoholic, unquote, may be used on malt beverage products provided the statement, quote, contains less than 0.5 percent alcohol by volume, unquote, appears in direct conjunction with it and readily legible printing and on a completely contrasting background.

(D) The term, quote, alcohol-free, unquote, may be used only on malt beverage products containing no alcohol, period, unquote.

Are you familiar with those regulations?

A. I am now.

Q. Isn't it fair to say that if you're going to give the consumer descriptive words on the alcohol content of the product in order to avoid misleading the consumer, you also have to give them specific information on the percentage of alcohol content by weight or volume?

A. Well, not necessarily. I think those regulations will

say that if it's alcohol-free it has no alcohol. I don't think that specifically states on there [56] it contains zero percent alcohol.

Q. Okay. But I think alcohol-free is certainly descriptive enough that a consumer is warranted in believing there's zero alcohol in there, correct?

A. That was the intent of the regulation.

Q. But one consumer thought that nonalcoholic meant alcohol-free, and that's not the case, is that correct?

A. That's correct.

Q. So if you're going to give consumers two types of information, generally the most accurate information is to state the percentage of alcohol content of the product, is that correct?

A. That's fair to say.

Q. Is there any reason why the agency would not have the ability to regulate the disclosure of alcohol content information on malt beverages expressed as a percentage of alcohol by volume?

A. I'm not sure what you're saying.

Q. Well, let me be more specific. Apparently the agency in the low-alcohol content context believes that brewers are capable of producing a product that [57] contains .5 percent alcohol or less on a fairly consistent basis, correct?

A. Well, yes, that's true.

Q. And that giving consumers that information is giving them information that the agency considers to be reliable information?

A. That's correct.

Q. Okay.

A. But all labels essentially should be reliable or they can't use them.

Q. Now, if the law allowed a brewer to put alcohol

content information on the label expressed as a percentage by volume, would the agency able to publish appropriate regulations that would prevent consumers from being misled, if you know?

A. I think so, yes.

Q. In other words, getting back to the Coors ad that was proposed here where it was going to be a simple statement that said contains 4.6 alcohol percentage of alcohol by volume, there's nothing inherently misleading about that, is there?

A. Not if it's correct. We do the same for [58] spirits and wine.

Q. Sure. And it would be done for malt beverages, couldn't it?

A. Right.

Q. Have you ever heard the argument made, Mr. Black, that giving consumers accurate information on the alcohol content of malt beverages expressed as a simple percentage of alcohol by volume would result in brewers marketing their product based on appeals to alcohol content?

A. I've heard a variety of those arguments.

Q. Okay. Isn't it true that in the agency's experience the marketing of malt beverages based on those type of appeals to alcohol strength is generally done through descriptive words that do not give accurate product information?

A. I'm not sure what you're referring to.

Q. Well, strong, full strength, Powermaster, light, in this case, dynamite?

A. Well, for the most part those terms are prohibited so we don't allow that.

Q. But it happens, doesn't it?

[59] A. It can happen.

Q. Is it frequent or infrequent?

A. Very infrequent.

Q. So as a general matter, brewers do not attempt to market malt beverages based on alcohol strength?

A. No, because they're prohibited from doing so.

Q. All right. But you've said even though they are prohibited, in isolated instances brewers do attempt to do that?

A. Take Powermaster, since you brought that up before. The regulation says that the term strong strength, full strength, extra strong, etcetera, is prohibited. The term power may or may not mean that, so here you're talking about whether or not one person's meaning of the word essentially means strong or strength.

* * * * *

[60] A. The brewer's own internal document said get the new up-strength beer to compete with some others. And when they in their own wording said this is an up-strength product, then we immediately said, okay, now you've told us what Powermaster means, and that's why we took the action we did.

Q. Okay. I understand. So if I understand your [61] comments correctly — and let me be more specific, that the Powermaster problem as expressed by community groups, this was being marketed to minorities in the inner city, I believe, is that correct?

A. That's correct.

* * * * *

[62] Q. Okay. We've already talked, Mr. Black, about the agency's position with respect to disclosure of product information in the statement that the ATF supports the disclosure in both the labeling and advertising of malt beverages of their alcohol content. Do you recall that?

A. I recall it.

Q. Now, when you say the ATF supports the dis-

closure in labeling and advertising of their alcohol content, is the agency referring to the disclosure of accurate information on the alcohol content expressed as a percentage by volume or weight?

A. I believe that's what the intent of that proposed legislation was.

[63] Q. It was not the intent of the agency to approve of disclosure of product alcohol content by saying it's strong or anything of that nature, correct?

A. That's the way I understand that, yes.

* * * * *

[64] Q. Let me be specific. You're aware that there are now warning labels on products with alcohol in them, including malt beverages, correct?

A. Fully aware of that.

Q. Fully aware. And the warning labels inform the consumer that there are side effects to the alcohol content of the product, correct?

A. No, they don't refer to alcohol content.

Q. All right. Bad question. The warning labels inform consumers that there is alcohol in the product and that the alcohol in the product has side effects, it can affect the unborn, for example?

A. I think you're partially correct. I don't believe the warning label really says anything about alcohol content. It more or less refers to the assumption of this product could cause these health problems.

Q. Okay. But the assumption of this product that could cause those health products, the particular component of the product that we're talking about is alcohol?

A. That's correct.

* * * * *

[65] Q. Certainly if you're going to warn consumers

about products with alcohol in them, it makes sense to also tell them how much alcohol is in the product, doesn't it?

MS. RUSSOTTO: I object. Are you asking again for—

MR. OADE: His opinion. His opinion based on 25 years regulating this industry.

[66] THE WITNESS: Let's just say that's a sensible position.

BY MR. OADE:

Q. Okay. And you would agree with that position based on your experience regulating the malt beverage industry?

A. That's true.

* * * * *

[70] Q. You're aware that certainly states do disclose the content of the product like, for example, Minnesota and some other states, is that correct?

A. That's correct.

Q. In what manner do these states disclose the alcohol content to consumers?

A. On the label in a variety of different places. They put it on the label.

Q. Is it expressed by a percentage of alcohol by volume?

[71] A. I'm not sure if it's volume or weight, but to us that's essentially immaterial as long as it's not misleading.

Q. Okay. And it's the agency's position that generally, in your experience, states that have disclosed the alcohol content of the product expressed as percentage by weight or volume that generally that has not been misleading?

A. That's correct.

Q. Have those states, where the alcohol content of the product is disclosed in that fashion have those states

experienced, if you know, any marketing of the product based on alcohol strength associated with that disclosure?

A. I'm not aware of any.

* * * * *

[72] Q. Okay. I asked you previously about Canada and other western countries. I think you said that you were aware that Canada requires disclosure of the alcohol content expressed as a percentage by volume, is that correct?

A. I may have said that. I'm not sure whether it's by volume or weight, but I believe they do.

[73] Q. And you're aware it's required, not just permitted?

A. Right.

Q. And if you have a can of malt beverage in Canada, it says right on the label the alcohol content percentage, correct?

A. I believe it does.

* * * * *

[75] Q. Is there a definition of light beers as far as the agency is concerned?

A. Not in general, no. We have requirements, though, that if the beer is labeled as light that they have to show a statement of calories, carbohydrates, some other things. In other words, we have a requirement if you're going to say your beer is light, you've got to put certain information on there that you don't have to put on if you don't put that light label on it.

Q. I see. So whenever you have some kind of descriptive statement such as light, you want accurate product information to be associated with that statement and give it some meaning?

A. Right.

[76] Q. Okay. And it's your testimony and belief that

calories and alcohol have some type of correlation, is that correct?

A. Well, we know that alcohol can be high in calories and there is a direct correlation between the lower calorie beers and lesser alcohol.

Q. Could a brewer put light on a beer, just call it light, when, in fact, it was at the upper end of the calorie-alcohol scale containing 4.6 or 4.9 percent alcohol?

A. Yes.

Q. A brewer could do that?

A. Yes.

Q. And a consumer might believe that that was not only a low calorie beer but a low alcohol beer as well?

A. I can't say what's in the mind of the consumer. But remember, if it's a light beer and it's labeled as light, the calorie content has to be on there so a consumer makes an informed choice by comparing that beer with another beer.

Q. Let me ask you this. How would a consumer faced with a beer labeled light even with a calorie [77] disclosure compare that to another beer that has no product information on it either with regards to calories or with regards to alcohol?

A. How would they make a decision?

Q. Yes.

A. I have no idea.

Q. So while you're giving the consumer some information about the calorie content of light beer, they really don't have any basis for comparing that calorie information to the regular beer, do they?

A. No.

Q. So it would be—it would be preferable to give the consumer as much product information as possible, wouldn't it?

A. You could probably say it's preferable, but again, there is no overwhelming consumer demand made on the part of the government to give them that information. So in other words, it's not a big issue to most beer consumers.

Q. As far as you know?

A. As far as we know. But we don't get—we get very few requests why don't you come out and tell us more [78] about the beer we drink.

Q. I've gone through the discovery file and I counted a number of such requests labeled—I thought at least four or five within the last several years, is that a small number in your judgment?

A. If four or five over the last several years a minute number. It's when you get a couple of hundred in a couple of months, then you've got a problem.

* * * * *

[79] Q. These letters that you have from consumers or Congressmen appear to be spontaneous. I have here a letter dated March 2, 1990, a John J. Mitchell, Jr. writes to a congressman which was forwarded to your office, and I'll just read you the letter. This is a letter to his congressman.

Dear Bob, In these times of, quote, truth in labeling, unquote, and every warning imaginable on products of all types and varieties, I find it a strange paradox there is no indication of the percentage of [80] alcohol content on beer, ale, stout or other malt beverages. Recently warnings that alcohol can be harmful, etcetera, are appearing, but no percentages.

Consumers have the right to know how much alcohol they are consuming, and there is nothing on the labels of malt beverages that discloses this information.

Legislation now in existence which might present or prohibit such disclosure on packaging should be swept away and the new laws passed requiring that alcohol content

of beer ale, stout and other malt beverages be clearly printed on all labels. Such legislation is long overdue. Very truly yours, John J. Mitchell, Jr.

I might be accused of writing this letter, but I can assure you I didn't. And it came to the attention of your office through the congressman, apparently a spontaneous letter from a consumer of the product. Is that correct as far as you know?

A. Could be.

* * * * *

[83] Q. We talked about Powermaster and St. Ides, which were, I guess, viewed as assessments by this agency to tout the alcohol content of the product. Do you recall those discussions?

A. Yes.

[84] Q. What other brewers in this country have, in your experience, the agencies experience attempted to market malt beverages based on appeals to alcohol content besides the Powermaster incidents in the St. Ides?

A. I believe Old English 800, which is a malt liquor put out by Pabst had some point of sale advertisements out in Spanish that essentially said, I believe it says the strongest or something of that nature. There may have been another one. I'm not familiar. But the whole issue came to light essentially with Powermaster and that the malt liquors point of sale advertisement tended to tout it based on strength.

Q. So you can think of basically four incidents where malt beverages were marketed based on appeals to alcohol strength?

A. Powermaster, St. Ides, the Old English 800. There may have been another one, but I'm —

Q. Possibly five then?

A. Four or five.

Q. Four or five in the last how many years?

A. Couple of years.

Q. Can you think of any prior to that?

[85] A. No, I can't specifically. I believe that our label people have said there were some potential labels they may have rejected, but I couldn't tell you what they are.

Q. So in your experience we've named the four or five you can think of?

A. Right.

Q. None of those by major brewers?

A. Well, depends on how you define major brewer.

Q. But none by Miller or Anheuser Busch or Coors?

A. Not that I can think of. Not that I can think of. One of those malt liquors could have been a Miller, but I'm not sure. I'm just — I just can't tell you for sure.

MR. OADE: That's all the questions I have.

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UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

No. 87-Z-977

ADOLPH COORS COMPANY, PLAINTIFF

v.

JAMES BAKER, SECRETARY OF TREASURY,
STEVEN HIGGINS, DIRECTOR, BUREAU OF ALCOHOL,
TOBACCO AND FIREARMS, DEFENDANTS

The Deposition of MICHAEL C. PORTER, taken before me, Carl M. DePerro, CSR-4284, Notary Public in and for the County of Wayne, State of Michigan, at 300 River Place, Detroit, Michigan, on Monday, July 20, 1992.

APPEARANCES:

BRADLEY, CAMPBELL, CARNEY & MADSEN
1717 Washington Avenue
Golden, Colorado 80401

(By K. Preston Oade, Jr., Esq.),

Appearing on behalf of the Plaintiff

ROBIN S. ROSENBAUM, Attorney at Law
U.S. Department of Justice—Civil Division
Room 932

901 E Street, N.W.

Washington, D.C. 20530

Appearing on behalf of the Defendants

* * * * *

[8] Q. What position do you hold here at Stroh's?

A. I am the Vice President of Marketing.

Q. And what responsibilities does that job entail?

A. Well, I am the senior marketing official of the company. So I oversee the department that develops the marketing plans for all of our beer brands domestically, that is, and oversees the execution of all of those plans and programs.

* * * * *

[47] EXAMINATION BY MR. OADE:

Q. First I would like to ask you some general questions about Stroh Exhibit Two.

My first question is, Stroh Exhibit Two, is that a marketing study per se? I am talking about the Awareness, Attitude, and Usage Tracking Study, Stroh Exhibit Two.

A. It is a document that is developed under the oversight of our market Research Department, if that answers your question.

Q. It says it's an Awareness, Attitude, and Usage Tracking Study. I think that speaks for itself, but could you explain what that is? Why would you track consumer attitudes?

A. A tracking study is a study that is done periodically, hopefully at regular intervals over time because what is being measured there in not absolute percentages or absolute awareness, but rather how those things change over time.

We are simply tracking how our products and certain competitive brands are viewed by [48] the consumer, how they are used by the consumer and how the consumer feels about those products in broad terms and how all of those measures are changing over time.

Q. Now, you were asked some questions about the characteristics, what you called relevant product characteristics.

Just looking at the survey are these characteristics that from prior consumer surveys Stroh is aware that consumers have in their minds when they think about the product?

A. I would say yes.

Q. And those four characteristics are taste, quality, strength and brand overall; is that correct?

A. Yes.

* * * * *

Q. That's what you mean by relevant product [49] characteristic?

A. Yes. And, of course, all malt liquors don't taste the same.

Q. So when we talk about these four relevant product characteristics, taste, quality, strength and brand overall, are we talking about malt liquors in general or are we talking about the particular Stroh product that's being surveyed here?

A. We are talking about malt liquors in general.

* * * * *

[50] Q. Now, when you are talking about strength what are you talking about?

A. You are talking about taste impact, if you will, or the fullness of body of the product, as well as the alcohol content.

Q. So strength relates not just to alcohol content, but to fullness?

A. Yes.

Q. Could that also be called bite?

A. Yeah. I suppose the brewers have a whole bunch of things they could call it, but yeah.

Q. Now, according to the correspondence here in Exhibits Four and Five between the ATF and Stroh the ATF

took the position that in referring to or marketing Red Bull with the name "The Real Power!" or "More Power To You!" that that violated pertinent regulations because it [51] referred to the alcohol content of the product. Is that your understanding?

A. That's what this document says, yes.

Q. And apparently, according to Stroh Exhibit Five Stroh withdrew any commercials referring to the word strength or power; is that correct?

A. Yes, it is.

Q. I want to talk for a moment about alcohol content, beer and other malt beverages, if I may.

Are you aware of the fact that in the United States brewers are prohibited from disclosing to consumers the alcohol content of beer and malt beverages?

A. Yes, I am.

Q. Now, you have been in marketing for how many years?

A. In the sum of my career?

Q. The sum of your career.

A. About twelve.

Q. And how many of those twelve years has dealt with the beer and malt beverage industry?

A. Eight.

Q. Do you know if it cost more for a brewer to produce a higher alcohol product?

A. No, I don't think I could say definitively.

Q. Are you aware generally of other countries, Western [52] countries, including Canada, Australia and the United Kingdom, of how alcohol content disclosures are made to consumers in those countries or whether they are in fact made?

A. I know that in Canada alcohol content is disclosed on the label. I don't know about the other countries.

* * * * *

Q. Does Stroh sell beer in Canada?

A. Yes, we do.

* * * * *

[53] Q. My question was just dealing with the marketing of the product. What I am trying to find out is, I am trying [54] to find out if the fact that alcohol content disclosures are required by law in Canada has caused Stroh to in any way change the marketing of its product in Canada based on that singular fact.

A. I would say no, it has not.

* * * * *

[55] Just for the record, we have marked as Stroh Exhibit Seven an example of an Old Milwaukee can that it's my understanding is sold in Canada.

BY MR. OADE:

Q. Is that correct?

A. Yes.

MR. OADE: Can we have a stipulation that this is what it purports to be?

MS. ROSENBAUM: Absolutely.

MR. OADE: Thank you.

* * * * *

[56] Q. Now, you indicated that you are not responsible for marketing in Canada, but are you generally familiar with how Stroh is marketed in Canada?

A. I have some general familiarity, yes.

Q. Are you aware of a single instance in the years you have been working at Stroh where there's been a difference in marketing approach in the Canadian market as opposed to the American market simply because [57] alcohol content disclosures are required in Canada?

A. I am not aware of any instance like that.

Q. In your experience—well, does Stroh sell a higher

alcohol product in Canada than they do in the United States, if you know?

A. A higher alcohol product?

Q. Yes.

A. For example, is Old Milwaukee higher alcohol in Canada versus the U.S.?

Q. Yes.

A. I don't believe it is.

Q. Are you aware of the Stroh Brewery Company or any brewer, any American brewer that sells beer in Canada actually increasing the strength of its product because alcohol content disclosures are required in Canada?

A. I have never heard of such a thing, no.

Q. Do you as a marketing professional have an opinion as to whether if alcohol content disclosures were to be required by law in this country or permitted by law whether that would cause brewers to market their product based on alcohol content to increase the overall strength of the product?

A. I don't feel comfortable speaking for the industry. I would say that I cannot imagine that we would do that.

[58] Q. When you say we, you mean Stroh?

A. Meaning Stroh.

Q. And why is that?

A. I just don't think that that's a responsible way of doing business, nor do I think that it is necessarily a relevant or significant piece of information to be imparted.

Q. You mean to market your product?

A. Yes, to market the product, yes.

Q. Are you aware generally as to what the trend in this country is with respect to malt beverages as a whole? And I say the trend, whether the trend is toward the higher alcohol, high calorie end of the market, such as malt liquors, or whether the trend is towards the light beer,

lower alcohol products?

A. Light beer products and nonalcohol malt beverage products are growing at a faster rate than the industry in total.

Q. Do you have an opinion as to why that is so?

A. I think there is an increasing awareness of the need for moderation. There is increasing concern for being overweight, and in general, there is just general healthy attitudes which are contributing to that trend.

Q. Now as a consumer of beer if I am concerned about how many drinks I can have to drive a car, for example, or [59] how many malt beverages I can drink say of malt liquor or a light or regular beer, how do I get that information?

A. I don't think that there is a way, not readily anyway.

Q. If I was concerned as a consumer about the alcohol contents of the product and I wanted to drink a lower alcohol content and I went on the shelf and looked at the light beers, do I have any confidence or how confident can I be if I select a light beer that it means that's actually a lower alcohol beer?

A. I don't know that consumers even know that light beer is lower alcohol than regular beer, if you will.

There is generally a perception that light beer is lower in calorie count but I don't think they really know that they are lower in alcohol.

Q. Just because a beer has light does that necessarily mean it's lower in alcohol?

A. You would be better off asking a brewing person. But I don't think—I think that the removal of the alcohol is a primary contribution to the lower caloric count. But a brewer could provide you a more expert answer.

* * * * *

[63] THE WITNESS: I think there is a perception that the reference to power includes references to alcohol content. I think that that is not a wholly incomplete perception. I think that there probably is some linkage there.

The growth that Old English 800 has experienced, in my opinion, and I think that's what's being asked for, my marketing opinion.

MR. OADE: Yes.

THE WITNESS: Is not wholly related to alcohol strength. My opinion is that Old English 800's growth as referenced in this document on usage and as we have read about in various trade journals is also attributable to the fact that over this period of time the product became far more affordable, if you will. There was widespread evidence that Olde English dropped their prices significantly in large parts of the United States, which made it cheaper relative to other malt liquors and relative to beer in total.

So I think that presents a more [64] complete picture.

BY MR. OADE:

Q. In your experience in marketing malt beverages, have you ever become aware of a product that was marketed primarily based on alcohol strength, in your opinion?

A. That's a tough question to answer.

I think that there probably have been some products which relied more on the usage, or certainly—yes, to answer your question.

Q. St. Ides, for example?

A. Yes. That's the example that came to my mind. So, yes.

Q. I think everybody in the industry is pretty aware of St. Ides, aren't they?

A. Yes.

Q. Would you consider that to be typical advertising in this industry or atypical advertising?

A. Atypical, thank heaven.

* * * * *

[68] BY MS. ROSENBAUM:

Q. Just so we are clear exactly what your position is with regard to Stroh's, you are the domestic marketing vice president; is that correct?

A. That's correct.

Q. Earlier you said that there is a general perception that light beer is lower in calories but not alcohol. Do you remember when you said that?

[69] A. Actually, what I said was, or if that is what I said that's not exactly the way I meant to say it.

Q. Okay.

A. There is generally a perception or an awareness that light beer has less calories than regular beer. I don't think that there is a great deal of awareness of the difference in alcohol between regular and light beer.

Q. So it's your impression that people generally think that light beer and regular beer have the same alcohol content relatively speaking?

A. I would say that there is a lot of confusion about it, yeah.

Q. When you say confusion, do you mean just nonawareness or do you mean something else?

A. I would say yeah, nonawareness and incorrect information. I am not sure how much they really stop and think about it, I guess is maybe the best way to put it.

* * * * *

[71] RE-EXAMINATION BY MR. OADE:

Q. You said you are domestic marketing manager. Do you also in the course of your job have any responsibilities

that touch upon or that involve how Stroh may be marketed in Canada or other countries?

A. That's not exactly a yes or no question.

Q. Why don't you explain?

* * * * *

[72] Q. Why don't you explain that?

A. I sit on the company's technical policy committee, which is a group of senior managers that actually discuss product development from a technical sense. I am one of the approvals for as Mr. Walker alluded earlier what we call our P.M.I.C. process, which is the process by which proposals for new brands, new products, product rollouts and so forth are approved and enacted by the company.

Q. That would include Canada as well as the United States?

A. Yes. That would include Canada as well as the United States.

* * * * *

Q. Do you have a degree in marketing?

A. I have a bachelor of business administration from the University of Michigan and an MBA from the University of Detroit. At Michigan my concentration was in marketing.

[73] Q. Do you consider yourself an expert in marketing, in the field of marketing?

A. Well, I have been able to convince Peter of that. That's on the record.

Q. You are talking about Peter Stroh?

A. Yes. I would consider myself an expert in marketing.

Q. Generally, and in the beer industry in particular?

A. Yes.

MR. OADE: That's all I have. Thank you very much.

* * * * *

[1] UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

No. 87-Z-977

ADOLPH COORS COMPANY, PLAINTIFF

v.

JAMES BAKER, SECRETARY OF TREASURY,
STEVEN HIGGINS, DIRECTOR, BUREAU OF ALCOHOL,
TOBACCO AND FIREARMS, DEFENDANTS

The Deposition of GEOFFREY S. WALKER, taken before me, Carl M. DePerro, CSR-4284, Notary Public in and for the County of Wayne, State of Michigan, at 300 River Place, Detroit, Michigan, on Monday, July 20, 1992.

APPEARANCES:

BRADLEY, CAMPBELL, CARNEY & MADSEN
1717 Washington Avenue
Golden, Colorado 80401

(By K. Preston Oade, Jr., Esq.),

Appearing on behalf of the Plaintiff

ROBIN S. ROSENBAUM, Attorney at Law
U.S. Department of Justice—Civil Division
Room 932

901 E Street, N.W.

Washington, D.C. 20530

Appearing on behalf of the Defendants

* * * * *

[4] G-E-O-F-F-R-E-Y S. W-A-L-K-E-R was thereupon called as a witness herein, after having been first duly sworn by the Notary Public to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION BY MR. OADE:

MR. OADE: Let the record reflect this is the continued deposition of the Stroh Brewery Company and we have just sworn Mr. Geoff Walker, who is with legal counsel here.

Q. I will just ask you briefly to state your name and position, if you would, please?

A. My name is Geoffrey, with a G, S. Walker. I am currently Assistant General Counsel and Assistant Secretary of the Stroh Brewery Company.

Q. And Mr. Walker, how long have you been with Stroh?

A. Since March of 1985.

Q. And how long have you been practicing law?

A. I was sworn in to the District of Columbia Bar in December 1976.

Q. And where did you graduate from law school?

A. Cornell.

[5] Q. How long have you been a legal counsel in the brewing industry?

A. Since March 1985.

Q. And as legal counsel in the brewing industry do you have any role to play with respect to approval of product labels?

A. Since 1989 I have been supervising and actively involved in our entire regulatory approval process, which includes product labels.

Q. Would that include product labels both in the United States and in Canada?

A. That's correct.

Q. Are you aware of the alcohol disclosure clause in Canada?

A. Generally, yes, but I am not an expert.

Q. Would you state your understanding of the laws?

A. My understanding is the alcohol content has to be on the label. I believe it's alcohol by volume, as opposed to by weight, and that there are disclosures that are required in Canadian advertising in both print and media advertising, the television media advertising which displays the alcohol content of the product.

Q. Have you ever seen Canadian ads on television?

A. Yes.

Q. Where do you live?

[6] A. I live in Southfield, Michigan.

Q. And in Southfield, Michigan and here in Detroit do you get Canadian television?

A. Yes.

Q. And have you ever seen an ad for Canadian malt beverages on Canadian television?

A. Yes.

Q. How do they handle the alcohol content disclosure?

A. I have seen it where there have been—in fact I remember a Coors Light commercial which, whether that's Molson or LaBatts, which makes that product, I believe it's Molson, and there was a similar to the disclaimer required of the P.M.I.C. In many cases there is an information line at the bottom of the screen which states what the alcohol is by volume. I am not sure the consumer can read that, but it's in the advertising.

Q. And it's also on the label of every bottle of beer?

A. That's correct.

Q. You have seen and I believe you produced Stroh

Exhibit Seven, which I believe is an example of how labels are used in Canada to disclose alcohol contents.

A. What Stroh Exhibit Seven is is a copy of what we call a blank, which is a facsimile of what our Old Milwaukee cans will look like flat, and it has all the required [7] mandatory information. And this is a document that in the review process, our approval process, we have at Stroh which I would see and have to approve before it would be approved for use.

Q. In Canada?

A. In Canada, that's correct.

Q. Now, I would also like to hand you Stroh Exhibit Four, which is a letter to Mr. O'Shea of the Stroh Brewing Company to Terry L. Cates of the Compliance Division of the ATF.

Are you familiar with that document?

A. Yes, I am.

Q. And that document sets forth certain regulations dealing with alcohol marketing practices; is that correct?

A. That's correct.

Q. I would like to direct your attention to the following statement that refers to the regulations and I will quote.

"The regulation at 27 C.F.R. Section 7.54(c) specifically states that malt beverage advertisements shall not contain the words 'strong,' 'high test,' or any similar words or statements likely to be considered as statements of alcohol content, [8] except where required by State law."

Do you see that?

A. Yes, I do.

Q. Was it the position of the ATF that Stroh ads for Red Bull that referred to it's the power or the real power violated that section?

A. I believe that was their opinion. I am drawing that

conclusion based on the letter and conversation which took place.

* * * * *

Q. As a result of discussions with the ATF did Stroh subsequently stop using those phrases?

A. Yes, we did.

Q. Now, are you aware—

A. By those phrases you mean the real power and more power to you?

* * * * *

[12] Q. I want you to assume for a moment that the lawsuit here between Coors and the ATF seeks to strike down a particular provision of the Federal Alcohol Administration Act which prohibits brewers from giving truthful information to consumers about alcohol content, but does not seek to in any way disturb the [13] regulation at 27 C.F.R. Section 754 (c). And I would like to ask you if in your opinion the ATF would have been able to have obtained the same result with respect to the ATF's complaint about it's the power or the real power, if Coors—if the section of the law that Coors challenges had not been in effect.

MS. ROSENBAUM: Objection. Calls for speculation.

BY MR. OADE:

Q. Do you understand my question?

A. I believe so, and I believe ATF would have sufficient enforcement power under Section 754(c) to take action against advertising that it deemed in appropriate as it related to the provisions of that section which talk about prohibiting advertising using the words strong, high test or similar words likely to be considered statements of alcohol content.

* * * * *

[14] Q. Of the Canadians—has there been to your knowledge any appeals to high alcohol strength in Canada or brewers marketing their product in Canada based on alcohol strength as a result of the mandatory disclosure of alcohol content?

A. I am not an expert on Canadian marketing practices. However, I have not seen in the commercials or in the context of reviewing materials in connection with either a dumping of litigation or our 301 petition, which would indicate that brewers in Canada are marketing [15] their products for hyping the alcohol content of the products.

MR. OADE: That's all I have.

* * * * *

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO

No. 87-Z-977

COORS, PLAINTIFF

v.

BAKER, ET AL., DEFENDANTS

The deposition of HUBERT ALPHONSE NELSON, called by the defendant for examination, pursuant to notice and pursuant to the Rules of Civil Procedure for the United States District Courts, taken before Doreen L. Boersma, CSR and Notary Public in and for the County of Cook and State of Illinois, on August 24, 1992, at 9:30 a.m., at Suite 329, 77 West Jackson Boulevard, Chicago, Illinois.

* * * * *

[6] Q. What was your former position at Heileman, or if you had more than one, if you could describe each of them, please.

A. Sure. I was director of marketing for the malt liquor division, and I was there approximately four and a half years in that capacity.

Q. What were your responsibilities as the director of marketing for the malt liquor division?

A. I was responsible for the marketing activity for all the malt liquor brands, whether that be advertising, promotion, positioning, creating of new products, anything

that dealt with the malt liquor division.

* * * * *

[10] Q. Is there a particular market that you have found through your experience with Heileman that drinks malt liquors?

A. Yes.

Q. And how would you describe that market?

A. Very easily. The malt liquor typical consumer is a man, 21 to 35—I'm giving you the prime drinking profile—urban dweller, some high school education, modest work, typically blue collar, not a very high economic pay level, city dweller, urban, black or Hispanic. That's your typical profile of a malt liquor drinker today.

Q. Is there a dominant category motivation for why a person would buy malt liquor as opposed to another type of beverage?

A. Yes. In my opinion the two things that dominate it are taste and strength of the product, alcohol strength. In many of the focus groups that I have participated in, the dominant phrase is "more high for the buy."

Q. What does that mean?

A. You get more alcohol strength from a malt liquor than you do from a beer. A beer product normally is 3.7 to 3.9 percent alcohol. Malt liquor [11] is slightly higher, 4.0. The leading malt liquors today are 4.5 to 5.5, and some are 5.9 percent alcohol.

* * * * *

[32] Q. Now, would you agree that—I think you [33] did say earlier that St. Ides and Olde English were marketing their products on the basis of strength in part? I think you said, for example, that St. Ides had a sticker that said "No. 1 Strongest Malt Liquor"?

A. Absolutely.

Q. So you would agree, then, that they were marketing their product on the basis of strength?

A. Yes, they were.

Q. And since their sales were increasing so rapidly, you would agree, then, that that marketing tactic was working?

A. Absolutely. And the Justice Department had done nothing to stop them, so we presumed that it was all legal. And the same things with Olde English 800 and their No. 1 slogan in both print, advertising, radio, and billboards, "It's the Power." They had been saying it for years, therefore it was approved by the BATF and nothing was done, so we assumed that that was quite appropriate.

* * * * *

[123] Q. Would you agree with the statement in this paragraph that says, "We ourselves have placed more importance on communicating the distinction of the high alcohol aspect of this brand as different from other malt liquor products"?

A. Yes. Keep in mind this is a letter from Della, Femina, the advertising agency, and the research director, Mary Hall, stating it. The "we" refers to Della and what they were trying to do on this project for Heileman. Yes, I would agree with that.

Q. And did you agree that this was a good tactic?

A. Yes, I would agree with that.

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-Z-977

ADOLPH COORS COMPANY, PLAINTIFF

v.

NICHOLAS BRADY, SECRETARY OF THE TREASURY; AND
STEVEN HIGGINS, DIRECTOR, BUREAU OF ALCOHOL,
TOBACCO AND FIREARMS (BATF), DEFENDANTS

PRETRIAL ORDER

Plaintiff, Adolph Coors Company, and Defendants, Nicholas Brady, Secretary of the Treasury, and Steven Higgins, Director of the Bureau of Alcohol, Tobacco and Firearms ("ATF"), jointly submit the following proposed pretrial order:

I. DATE AND APPEARANCE

The pretrial conference in the above-captioned matter is set for Friday, September 11, 1992. K. Preston Oade, Jr., Esq., will appear on behalf of Plaintiff and Patricia M. Russotto, Esq., will appear on behalf of Defendants.

II. JURISDICTION

Jurisdiction in this matter is predicated upon 28 U.S.C. § 1331 and is not contested.

III. CLAIMS AND DEFENSES

This matter is before the district court for very specific factual determinations related to the constitutionality of

27 U.S.C. § § 205(e) and (f), pursuant to the opinion of the United States Court of Appeals for the Tenth Circuit filed on September 23, 1992. These statutory provisions generally prohibit "statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages" in both the labeling and advertising of malt beverages. The Tenth Circuit, applying *Central Hudson Gas v. Public Serv. Comm'n*, 447 U.S. 557, 563 (1980) already has concluded that the disclosure of accurate alcohol content information is "within the ambit of First Amendment protection." In addition, the Tenth Circuit has determined that the government has a legitimate interest in preventing "strength wars" among brewers. However, the Tenth Circuit remanded the case for factual determinations on the questions of "whether the federal regulation of alcohol content advertising directly advances the government's asserted interest in preventing strength wars, and whether the complete prohibition of such advertising results in a 'reasonable fit' between the legislature's goal and the means chosen to reach it."

It is Coors' position that permitting disclosures to consumers of the percentage alcohol content of the product in labels and advertising will not cause alcohol strength wars. In fact, other western countries disclose such information and alcohol strength wars have not resulted. In other countries requiring alcohol content disclosures to consumers, any danger of marketing the product based on appeals to alcohol strength have been effectively controlled through marketing codes that prohibit such practices. The ability of other countries to legislate directly against the asserted fear of alcohol strength wars demonstrates a lack of "reasonable fit" between the legislature's goal and the means chosen to reach it.

Coors does not challenge the government's right to regulate marketing practices to effectively inhibit brewers from engaging in alcohol strength wars. Coors wishes only to disclose to consumers the percentage alcohol content of its products and does *not* challenge existing law and regulations that prohibit descriptive statements of alcohol content (such as "strongest" or "boldest" as provided in 27 C.F.R. § 7.31(f). Coors challenges the existing law and regulations only to the extent that they suppress publication of accurate information to consumers concerning the alcohol content of the product (prohibited by 27 C.F.R. § 7.31(g). The manner of disclosing accurate alcohol content information to consumers can and should be regulated by the ATF to ensure uniform practices and prevent brewers from using this information to market the product based on appeals to alcohol strength.

It is Defendants' position that a present-day, factual showing is not necessary to establish that strength wars will result and that the means chosen by Congress to address that concern are no more restrictive than necessary to prevent strength wars from occurring. Instead, evidence that was before Congress in 1934, when the statute was enacted, is sufficient. In any event, Defendants argue that, in the absence of the statute at issue, a significant number of beer consumers will rely upon alcohol content information—whether used in marketing, upon labels, or both—to make purchasing and consumption decisions regarding malt beverages. A significant number of those consumers will use the information to select beers with higher alcohol content. Absent the statutory provisions at issue, brewers will increase the alcohol content of their beers to compete with each other for those consumers. The up-strength malt liquor industry, which comprises only about two percent of the total market for malt beverages, already has tried to compete for market share on the basis of strength, but the

statute allowed Defendants to take enforcement action to stop such competition.

IV. STIPULATIONS

The parties have entered into no stipulations as of the date of this filing. However, the parties expect to enter into a stipulation regarding the use of alcohol content-based advertising by the McKenzie River Brewing Company. The parties also expect to stipulate to the vast majority of trial exhibits.

V. PENDING MOTIONS

No motions are pending as of the date of this filing. However, the current deadline for filing dispositive motions is September 21, 1992, and Defendants reserve the right to file a motion for summary judgment on or before that date.

In addition, Defendants will move for a continuance of the trial date as a result of Plaintiff's identification on September 8, 1992, of two additional experts it wishes to use at trial.

VI. WITNESSES

Defendants intend to rely upon the witnesses listed below at trial. However, Defendants advise that this list is not final in light of Plaintiff's identification on September 8, 1992, of two additional expert witnesses it wishes to call at trial. Defendant, therefore, expressly reserves the right to identify additional witnesses, including expert witnesses, who may be called at trial.

Nonexpert Witnesses:

- A. Terry Cates, former Chief, Industry Compliance Division, ATF. Mr. Cates will testify regarding

ATF enforcement actions taken pursuant to the statute at issue. Will be present at trial.

- B. Lutz Issleib, Chairman of the Board, Pabst Brewing Company. Mr. Issleib will testify, via deposition, regarding Pabst's competitive response if statements of alcohol content are permitted in beer labeling and advertising.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-Z-977

ADOLPH COORS COMPANY, PLAINTIFF

vs.

JAMES BAKER, SECRETARY OF THE TREASURY AND
STEVEN HIGGINS, DIRECTOR, BUREAU OF ALCOHOL,
TOBACCO AND FIREARMS, DEFENDANTS

DEPOSITION

The following is the deposition of TIM AMBLER, taken before Maureen B. Gregory, RPR, pursuant to Notice of Taking Deposition, at Radisson Plaza Hotel, 85 South 7th Street, Minneapolis, Minnesota, commencing at approximately 9:00 A.M., September 21, 1992.

APPEARANCES:

On Behalf of the Plaintiff:

K. Preston Oade, Jr., Esquire
Bradley, Campbell, Carney & Madsen
1717 Washington Avenue
Golden, Colorado 80401

On Behalf of the Defendants:

Robin S. Rosenbaum, Esquire
Trial Attorney
U.S. Department of Justice
Civil Division
Federal Programs Branch
Room 932
901 E Street NW
Washington, D.C. 20530

* * * * *

[4] PROCEEDINGS

(Whereupon, the deposition of TIM AMBLER was commenced at 9:00 A.M. as follows:)

(Witness sworn.)

TIM AMBLER,

called as a witness, being first duly sworn, was examined and testified as follows:

* * *

EXAMINATION

MR. OADE: This is the deposition of Timothy Felix John Ambler, A-m-b-l-e-r, taken pursuant to Notice under Rule 30 of the Federal Rules of Civil Procedure. It's been the understanding of the parties that this deposition will be used for purposes of trial testimony. Mr. Ambler has come in from London, England to provide his evidence in the case.

BY MR. OADE:

Q. I'd like to start by getting your present address if I might, please, and your current position.

A. My office or home address?

Q. Office.

A. It's London Business School, Sussex Place, London NW1 4SA.

[5] Q. And do you hold a current position with the London School of Business?

A. I'm a senior research fellow at the London Business School.

Q. And in what subjects do you specialize at the London School of Business?

A. I study—well, I specialize in international marketing, the way marketing managers work. And I teach the global marketing course at the school.

MR. OADE: I would like to mark as the first exhibit in this case a copy of your curriculum vitae with the attached expert report and appendix. I'll ask the court reporter to mark that as Exhibit 1, please.

(Whereupon, Deposition Exhibit No. 1 was marked for identification, and a copy is attached and hereby made a part of this deposition.)

BY MR. OADE:

Q. I'm going to hand you what has been marked as Deposition Exhibit 1. And I'll ask you to identify that for the record, if you would.

A. That is my opinion.

Q. And do the first two pages of your opinion summarize your qualifications and [6] experience?

A. Yes. I hope so.

Q. And who wrote Deposition Exhibit 1?

A. I did.

Q. There's also an attachment to Exhibit 1. Would you identify that, please.

A. Well, the attachment is an extract from the Code of Advertising Practice of United Kingdom. And it's Section C.XII which is the bit that deals with advertisement for alcoholic drinks.

Q. With respect to advertisements for alcoholic drinks, have you done anything or been consulted in connection with the regulation of advertising for alcoholic drinks in the United Kingdom?

A. Yes. In about the mid-70's I took part in the first ever drafting of this code that's attached. About—I can't remember to be precise, but about five years later than that we reworked it because one or two people had relatively minor complaints about one or two things. And I chaired the group that re-edited it at that time.

And it was subject to a further set of [7] changes, again

they were all minor, about five years after that. And although I wasn't on the committee, one of the people who answered to me was on the committee. And I worked with the committee indirectly on those changes at that time.

Q. Does Deposition Exhibit 1 accurately set forth your qualifications and experience on the first two pages, I believe?

A. Well, it's on the first page. And then there's a CV attached on the back of this, which comes just before the appendix.

Q. And does that accurately, the CV and the first page, accurately set forth your qualifications and experience?

A. Yes. I mean, it's a single page. But all I put on that was the factors I felt to be relevant.

Since writing that, there are, I think there's one area of experience which I didn't put on which I think is relevant, which is my experience in the United States. But you may wish to ask me about that later.

* * * * *

[9] Q. When did you get your degree in marketing at the Massachusetts Institute of Technology?

A. 1969.

Q. And have you been engaged in marketing in the marketing field since that time?

A. Yes.

Q. And what brings you to Minneapolis today?

A. Well, I'm teaching a marketing course to some senior marketing people.

Q. Do you also have experience in the social issues involving alcohol and alcohol abuse?

A. Yes. My interest in that started about that time in the mid-70's about the same time as this Code of Practice and drawn up. And it became obvious to us at that time

that an alcoholic [10] drinks company has to take a responsible attitude to the use of its product.

That wasn't a new thought. I'm sure they had that thought a hundred years ago. But it was a new thought in the sense of actually getting out and meeting people to work in this sort of area and doing something about it rather than just sort of thinking about it.

I joined at about that time the Social Aspects Committee of the Wine and Spirits Association. And subsequently became Chairman of it for, again I'm not sure of the precise time, three or four years. And I was on that committee for about 10 years.

And that committee worked with the equivalent groups of the Brewers Society and the Scotch Whiskey Association and government groups and people in the sort of—I'm not quite sure what way to describe them accurately. But you know, who are interested in social effects but are not part of the industry. And obviously during that time I spent quite a lot of time and involvement in that.

Most recently I gave an address at the European Parliament about this subject. That was [11] last October. Looking at the various ways of dealing with alcohol abuse. Of which the two main strands are control theories and education.

Q. Now, in this particular case you have been asked to testify concerning the disclosures of other countries with respect to the alcohol content of alcoholic products; is that correct?

A. That's correct.

Q. Are you familiar with how other countries handle the regulation of alcohol product advertising and alcohol content disclosure?

A. In broad terms I'm reasonably familiar with that.

Not obviously with every country in every detail. And I've also specifically inquired, following your asking me, for the regulations on the particular matter of disclosure of content, alcoholic content.

Q. And I would like to—first of all, does your report summarize the provisions of various countries with respect to alcohol content disclosure?

A. Yes. In sections 2.1 and 2.2.

Q. Have you had a chance to review your expert report prior to this deposition?

A. Yes.

* * * * *

[13] Q. All right. Thank you. Now, would you [14] just summarize very briefly the experience of the United Kingdom with informing consumers about the alcohol content of malt beverages and beer. Let's start with what is the current practice and how long has that been done?

A. The current practice is to—declare the strength as a percentage alcohol by volume. And next spring that will also be the base for taxation. And so they're consistent. The authorities like to have them the same and they can use the same enforcement.

Prior to that—and that's quite a new development. That's only within the last year or two. Prior to that, the brewers were required to express the strength of beer in bands by original gravity. And that in turn wasn't a very long-lasting piece of legislation. That was only brought in about maybe ten years ago.

And prior to that there was no declaration.

Q. Now, in making the current disclosure of percent alcohol by volume in the United Kingdom, how is that disclosure made?

In other words, is it placed on the label or is it in ads or exactly how is it done?

[15] A. It has to be on the packaging but it doesn't have to be on advertising. And I don't think I've ever seen it on advertising.

Q. When it is put on the packaging how is it done; is it just placed on there as part of the ingredients?

A. It's placed—obviously different manufacturers put it in different places. It has to be mandatory minimum size so that it's easily seen by the consumer. And it is usually put with the—not with the ingredients because ingredients don't have to be stated on beer. But in that sort of little panel of factory information. There's an E number for the size. It's usually put, for example, with the size and the content.

Q. Let's turn to the European community. Does the European community currently disclose the alcohol content of malt beverages to consumers?

A. Yes. This United Kingdom disclosure is in fact an EC piece of legislation rather than a UK piece.

Q. What are the EC countries that you're referring to?

A. There's twelve. In addition to the [16] United Kingdom there's Ireland, Portugal, Spain, France, Luxembourg, Belgium, Holland, Germany, Denmark, Greece. How many have I got up to?

Q. I think that covers it. Now, in these EC countries, you say this has been in effect for approximately year and a half, two years?

A. That's all.

Q. Were there any alcohol disclosure laws in any of these countries prior to that?

A. Yes. And it was variable. And I cannot, I'm afraid, tell you exactly what each had. And it's quite complicated. But they used different measures. But some were using alcohol by volume, for example France did.

Q. Are you also familiar with the regulatory laws in

the country of Australia with respect to disclosures of alcohol content on malt beverages?

A. Yes. That is the same as in the EC. So in addition to the EC there's Australia, Canada, New Zealand, Norway and Japan. All of which needs alcohol by volume.

Q. Now, in Australia, how long has Australia disclosed the alcohol content of malt beverages to consumers, if you know?

A. Well, they followed the same pattern as [17] United Kingdom broadly. Because of course, they came from the same cultural base. If one wishes to accuse Australia of culture. And again, I have to be careful here because I'm not knowledgeable about Australia, per se.

But there has been a tremendous interest in Australia in light beer, much lighter than here. Down about 2 percent. And Swan Light which came from Perth in western Australia is given the credit by some people—I don't know how factually true this is. I mean, it's certainly true that it's a first in light beers. But it is also believed by some people that that caused an interest in putting the strength on the cans so that the consumer could see what they were getting.

Q. How long has Canada had alcohol content disclosure laws, if you know?

A. I don't know.

Q. We've seen some information or actually there's been exhibits in this case that indicate that Canada has had disclosures law since 1976. Could you comment on that?

A. That sounds quite likely. I mean, my experience of Canada has largely been in the wine [18] and spirit area. Gilbert Canada Company is about the second or third largest wine and spirit company in Canada. And I had responsibility for that.

So I'm reasonably familiar with the Canadian market-

place. But I don't have direct beer familiarity with Canada.

Q. Now, have you been asked to determine whether these alcohol content disclosure laws have resulted in any evidence of brewers raising the alcohol content of their product for marketing purposes or any other purpose after these alcohol disclosure laws took effect?

A. There has been—and obviously one has to distinguish between marginal changes in order to round up to a whole number or to a number which the brewer thinks is attractive, and any changes of significance one way or another.

So for example, that if a brewer was previously on 4.1 or 3.9 they may well have rounded the number to four because it looked tidier on a can once you had to put it on a can.

There is no evidence in the public arena about that. Because obviously by definition the previous precise strengths were not known.

[19] I think the drift of your question is, is there any significant shift upwards in order to, as it were, form a competitive advantage. And the answer to that is no.

Q. And how do you know that the answer to that question is no?

A. Well, because in the UK, as in many other countries, there is quite a body of people who are not friendly to the alcoholic drinks industry and believe that the drinks industry is responsible for a lot of the alcohol abuse problems. And that forms a very significant lobby which, as I said, in the UK has been particularly strident since the mid-70's. So I'm not trying to take sides on this issue. It's a fact.

And therefore, whenever the alcoholic drinks industry does something which it considers wrong, one can count

on them to make quite a lot of noise about it. I read the newspapers. I see the media in the UK. And there hasn't been that noise.

Furthermore, we set up, again about 10 years ago, an organization called The Center for Information on Beverage Alcohol. Which is a worldwide data base for information about these [20] kinds of issues, about social issues of alcohol, scientific advances, all the problems of alcohol abuse and so on. And that is based in London. But as I say, it gets its information from all over the world.

And once a month it sends out to its subscribers a summary of news in the specialist area. And as I was one of the group that set that up, I've been getting their monthly summaries ever since. Occupies a full shelf on my book case. And that would pick up that kind of problem.

Q. And did you review that data base in connection with this case?

A. Indeed I did. That's where I got quite a lot of this information from.

* * * * *

[21] Q. Are you familiar with the range of various malt beverages that are sold in the United Kingdom and the European community? And when I say range, I'm talking about the range of the product with respect to alcohol content from the lowest alcohol content to the highest.

A. I'm more familiar with the range in the UK than with Europe as a whole. But yes, I would say that I had a fair familiarity with the range of beer which is sold.

Q. What are the—is there some way to describe the range of products, malt beverages, with respect to alcohol content in the United Kingdom or elsewhere?

A. Well, as I said in my document, they range roughly from 3 percent—if you ignore the relatively new, very low alcohol beers. But if you look at beer as beer, it ranges

from a low of about 3 percent to a high which is under 9 percent in the mainstream.

As I say in my document, there are, particularly in northern France and in Belgium, some beers which are more stronger than that. They're a tiny market. And in eastern Europe there are some beers which are stronger than [22] that. Although their sales are going down.

But the mainstream is in the 3.5 to 5.5 bracket.

Q. Now, when you're expressing these percentages, are you talking about alcohol content by volume—

A. Yes, I am.

* * * * *

Q. Has the range of alcohol content of malt beverages in the United Kingdom changed to any extent as a result of alcohol disclosure laws?

A. Well, as I was saying earlier, one cannot be entirely certain about that. Because you're looking at a situation where there was no declaration to one where there is a declaration. [23] So the comparison is not strictly available.

Except each brewer will know about each brewer's own strength and any of the competition's strengths that they measure. But they don't put that into the public arena. So I cannot say that there has been absolutely no change for that reason.

Has there been any significant change? Significant change, which I would define for you, if you like, is one which is going to impact the consumer. And therefore the consumer will be aware of it and therefore it will get into the media and into the trade press.

And the answer to that is there has been no such commentary in the trade press or media. And therefore there has not been a significant change.

Q. Do you have an opinion as to whether or not alcohol disclosure laws in the United States would cause a

significant change in the marketing practices of brewers in this country?

A. It would be foolish to say that it is impossible for there to be any change. Because in a competitive market many strange things can happen. So I have to express my opinion in terms [24] of extreme unlikelihood of there being a significant change because of that. For a whole number of reasons. One or two, to start with, impress me.

Reason number one is that brewers in virtually all countries—beer is a volume business and they're motivated by thousands of barrels. And the—all the evidence of the beer business is that in most countries there is a bell-shaped curve around that mainstream 3.5 to 5.5 bracket. And that's true in this market as it happens also.

And that's because beer, which is primarily drunk for refreshment, is at its most refreshing at that strength level. The stronger beers are less refreshing. And therefore, the brewers will continue to target where the volume is and that's it.

Which is not to say that they won't introduce other beers at a lower strength and a higher strength because they wish to cover the market. But that's not where the volume is. And they will continue to put their marketing efforts primarily to where the volume is. That's one reason.

[25] I know I said I'd give you two. The second reason is that in the climate of opinion about alcohol in this country at the present time where it is perceived as a drug by many people, which is a controversial thing. It's a drug in a sense. So is caffeine. But it's not a drug in the sense of hard drugs, with which it's nowadays linked in this country.

And in this climate of—in this marketing environment it seems to me highly unlikely that any of the brewers will go after targets that will be considered by mainstream opinion as being irresponsible marketing.

Q. Now, you said that the alcohol products with respect to malt beverages show basically a bell curve; is that correct?

A. Uh-huh.

Q. And does that bell curve, is that the lowest in alcohol content and then curving up and down to highest in alcohol?

A. Yes. And let me be clear, I'm talking in very loose terms. I haven't done the statistical analysis to prove that there is a normal, to use a technical word, shape for the distribution of beer volumes.

[26] But in broad terms I'm saying that there is a central mass of business in that central span. And then there are some extremes coming off the end of that which are the low and the high extremes.

At least there is in unregulated markets. Obviously markets where beer strength is regulated and has to be particular bands, that interferes with a free market. In a free market you tend to get that shape.

Q. Have you thought about how instituting alcohol content disclosure laws in this country might affect that bell curve of the alcohol strength of the products that are regularly sold?

A. It's my opinion—and it can only be an opinion—that, as I said earlier, that the brewers may increase the range that they offer in order to fill all the segments. That is not to say that they will increase competitiveness in the less popular areas; i.e. very low strength and very high strength. And it isn't to say that very much more will be consumed in those areas.

But obviously, once the consumer is more aware of strength on pack, there will be a concern likely, to look at other countries, for brewers to [27] be sure that those categories are filled.

Q. I'm going to hand you a blank piece of paper. And I'll ask you to draw in red ink, the bell curve as you see it presently. And then draw in another ink how the bell curve of alcohol content—

A. Better give me your red pen.

Q. —might change, in your opinion, if alcohol content disclosure laws are premitted.

A. In this country?

Q. Yes, in this country.

A. I'm going to mark this illustrative and non-statistical. Because obviously this is not based on any market research or other research. It's my understanding that light beer is slightly under 4 percent alcohol by volume. That may or may not be correct. But it's somewhere around that. So for argument sake I'll put 3.8 there. And regular strength beer is around five. And there's more liquors up around six or higher.

MS. ROSENBAUM: By volume or by weight?

THE WITNESS: By volume. Yes, by volume. Now, so therefore at the moment in this country you have very little in the—so this is not correctly drawn. You have hardly anything in [28] the very low area. You haven't got much in very high either.

BY MR. OADE:

Q. Try it again, here.

MS. ROSENBAUM: What's wrong with the first one?

THE WITNESS: I would like to change my mind because I made those tails too big. Because the markets are smaller than that.

MS. ROSENBAUM: You're not going to mark this as an exhibit?

MR. OADE: Well, the witness is going to correct it. If you want to use it on cross-examination you may. But I don't want to clutter up my deposition with it.

MS. ROSENBAUM: Okay. Thanks.

THE WITNESS: It's my understanding that the malt liquor market is about 3 percent of the malt beverages market. And whether that's correct or not, that's what this is supposed to say. So if my drawing isn't really very good, I'm just making an argument for that.

(Drawing diagram.) Are we talking about sales or number of brands? Sales?

BY MR. OADE:

[29] Q. Sales, yes. And number of brands and sales of number of brands.

A. Well, that's three different curves. I don't think I can do that. So that's—I wouldn't pretend to be an artist.

MR. OADE: All right. Let's mark this as Deposition Exhibit 2. And then I'll ask you to explain it.

(Whereupon, Deposition Exhibit No. 2 was marked for identification, and a copy is attached and hereby made a part of this deposition.)

THE WITNESS: So what I'm basically showing there is that the volume of sales will, in my opinion, continue to be in the existing broad band of the central mass market.

But there will be some marginal increase, which in terms of the total beer market will be very small. In terms of various different tails will be relatively big relative to them. Because people who are interested in these things now that they can see them on the pack will want to try them.

And I think that that seems to be the experience of other countries insofar as I can tell. This is not very solid information.

[30] BY MR. OADE:

Q. So when you say the tails will increase, you're saying that there will be some marginal increase in both low alcohol malt beverages and high alcohol malt beverages?

A. That will be what my expectation is.

* * * * *

Q. Have you become aware in a general sense [31] of the level of knowledge of alcohol content in this country with respect to malt beverages?

A. I was first made—and I've been vaguely aware ever since I was to school here. And I went out to buy some beer and I couldn't find out how strong it was. So that was in '68.

But the main force of this issue came home to the industry at large, including me, with the Seagrams equivalency campaign, which I can't remember how long ago that was. But it's pretty well known. And they did a lot of work in this area.

Q. Does the professional literature at all address the knowledge of alcohol content of consumers in this country?

A. Yes. And I made a reference in my opinion to a paper that I'd come across, which is a new one. And so I thought that was a perfect one to quote. Which is the one indeed we brought up earlier which is the Martin, et al paper in the Journal of Drug Education.

Q. I will hand you a copy of an article entitled "Young Adults' Knowledge of the Strength of Different Alcoholic Beverages" and ask you if you can identify that document as the study [32] referred to in your report.

A. That is the one.

MR. OADE: And I'll ask the court reporter to mark that, please, as Exhibit 3.

(Whereupon, Deposition Exhibit No. 3 was marked for identification, and a copy is attached and hereby made a part of this deposition.)

THE WITNESS: May I volunteer a comment here?

BY MR. OADE:

Q. Certainly.

A. Of course, I've only just recognized that your name in the bibliography is you. And I thought one might assume that I received this document from you. I would like to say actually that the reference I picked up was from the Center on Information on Beverage Alcohol. And that was my lead to that particular article. It wasn't from the attorney.

Q. Thank you for that clarification. Now, do you have an opinion on whether or not the experiences of these other western countries we've been talking about with disclosures of alcohol content of malt beverages is at all relevant to what might happen in the United States if alcohol [33] disclosure was permitted?

A. To answer this question may I briefly digress. One of the things one comes across most often as an international marketer is a view of people in any particular geographic location that their market is totally different to anybody else's. And if you go from London to Manchester they will tell you Manchester is entirely different from London and bears no relation to it.

And wherever one goes in the world, this is what one would hear. And the truth of the matter, of course, is that there are similarities and differences everywhere.

And Ted Levitt published a famous article in 1983 about the globalization of markets drawing to the fact that in today's communication age, the world is becoming so alike that one can now in marketing terms concentrate on the similarities and forget about the differences.

So of course there are differences and similarities. But my answer to your question is I think the similarities here are more important than the differences.

Q. And what do you see as the similarities in the

American marketplace as compared to the [34] marketplace in Canada, United Kingdom or the European community that you think makes their experience with alcohol disclosure laws relevant?

A. The Canadians obviously share 4,000 miles or whatever it is of common boundary and, with the exception of one province, a common language, and very similar styles of beer. The marketplace is becoming increasingly alike, especially in the beer category as the American—as the Canadians move to deregulate the industry there.

Obviously, if one moves to Europe there are bigger differences for various reasons. One could argue that there are bigger differences within Europe than there are between the United Kingdom and the United States. And yet, the Europeans introduced one piece of legislation on this particular subject across all the 12 different countries and cultures of Europe with no hassle and surprisingly easily with little consumer comment or complaint. And indeed, it was a consumer interest move.

And so that I would look to the similarities of culture. I mean, the beers in this country mostly originated from Germany. Most of the people in this country originated from [35] Europe. And therefore—I mean, there are differences, of course.

One of the many differences, to keep this even-handed, is in the distribution system whereby you have a legal three-tier system which is not true of Europe. And the consumption on premise in the UK is greater than it is in the USA. But I don't think there's really consumer differences. Those are just means of getting the product to the consumer.

Q. Now, you have, I take it, studied and taught marketing not only in the UK, but also in Canada and the United States; is that correct?

A. Yes. I mean, by taught, I haven't taught at an American business school the way I do in the UK. But I've taught in company seminars and that sort of teaching.

Q. Based on your experiences in teaching marketing and doing marketing, do you see any fundamental differences in the marketing approach of American brewers that would indicate to you that beer is marketed in this country in so different a way that the experiences of these other countries is not relevant?

A. No. I think that the—again, there are [36] differences within Europe which are greater than the differences between the United Kingdom and the United States. And I think sometimes it's very great.

For example, in both the United Kingdom and the United States television advertising is the main vehicle for the marketing of beers. In France, you're not allowed to use the television for advertising beer, which was banned about 18 months ago. So there are, as I say, more differences in Europe than there are across the continent.

Q. Have you had occasion to read the decision of the US Court of Appeals in this case with respect to the issue in this case on alcohol content disclosure laws?

A. The decision in the Court of Appeals. You sent me some material about the trial at the federal court level. The Court of Appeals, if I read it, I have forgotten it.

Q. Okay. Do you have an opinion with respect to ways to prevent the alcohol—or the marketing of malt beverages based on the alcohol strength other than suppressing information to consumers?

[37] MS. ROSENBAUM: Objection. Counsel is testifying at this point. There's been no evidence that information has been suppressed from the consumers. In fact, there's other evidence in this case which indicates that such information is available from other channels.

BY MR. OADE:

Q. Well, I will limit my question to suppressing information from consumers on labels and in ads on malt beverages.

Is there a way to prevent brewers from marketing the product based on alcohol strength that would allow consumers to be informed of the alcohol content of the products on labels and in product ads?

A. I have to say I like the objection more than I like your question. Can I just—am I allowed to ask questions about the objection?

Q. Certainly.

THE WITNESS: As I heard you to say, you said that it was all right to tell the American public about the strength of beer as long as you didn't put it on the pack. That's what you said?

MS. ROSENBAUM: Put it on the pack or put it in the advertisements. Yes, that's correct.

[38] THE WITNESS: So the position being taken here that it's all right to tell people as long as you don't put it in the appropriate place.

MS. ROSENBAUM: I'm not an expert on this. And I'm not testifying today.

THE WITNESS: I'm just a seeker after truth here.

MS. ROSENBAUM: I'm just correcting the impression that the information might not otherwise be available. Because in point of fact it is.

THE WITNESS: Very good. I'm sure we'll come back to that. Can you ask me your original question again more briefly. Because I was having a job with it.

BY MR. OADE:

Q. Yes. What I'm trying to get at here is you are aware that the government's position in this case is an asserted fear that if alcohol content were disclosed on product

labels and in ads, that that would lead brewers to market their product based on alcohol strength; are you aware of that position?

A. Yes.

Q. Is there a way to accomplish that goal [39] while at the same time permitting alcohol content disclosures on product labels?

A. The short answer is yes. And I think this seems to me, when I read the account of the trial, the substantive issue.

And therefore, while I was asked the narrow question of would alcohol strength wars or beer strength wars result from putting the quantities on the packages — and that was a narrow question — the reason why I answered it in my opinion much more broadly to incorporate the wider aspects of social — what the wider social aspects, which I'm sure some people would think was inappropriate, the reason for that was precisely because the comment I read there of no more extensive than necessary.

In other words, it seemed to me reading that — and I'm not a lawyer and I'm not an American, so if I'm going too far you have to stop me — that what the ordinary person is looking for here is a mechanism which will permit information but curb abuse. Therefore, the question just asked, what other means are there for curbing abuse. And maybe those means are better tailored, more appropriate and less extensive.

[40] And the answer to that is yes. In the Code of Practice that I attached, there is a prohibition on marketing beer on strength and using words like "extra strong" or anything like that to market beer with. Now, it's also the law, as I understand it, in this country and would continue even though — even if the quantities were put on the packs.

This Code of Practice which was put together in the

UK in the mid-70's originally was very influential on various other codes of practice put together in other countries around the world. And the Federation Internationale des Vins et Spiriteux — that's going to stretch you — used it in its worldwide recommended Code of Practice.

And there are codes of practice in this country for the Beer Institute, the Wine Institute, and the Distilled Spirits Council all have codes of practice. And to stay with beer, which is what we're talking about, I believe that codes of practice prohibiting the use of strength in marketing is the norm, is effective, seems to work.

Q. Would you turn to page four of your [41] report, paragraph 3.4. And I'll read this into the record and then I'll ask you a question.

"There is a clear distinction between the provision of factual numeric information on packaging and the use of value laden semantics, such as strong, export or heavy. My understanding of this case is that Coors seeks permission for the former but not the latter."

Is that your opinion that there's a clear distinction?

A. Yes.

Q. And would you explain that, please, what the distinction is.

A. I'm sorry. I'm not quite sure that I can explain the difference between black and white.

What do you mean by that?

Q. Well, when you say there's a clear distinction between the provision of factual numeric information and the use of value laden semantics, such as strong, export or heavy, I guess my question wasn't very good. But with respect to that distinction, is that what you were just explaining?

A. Yes, it was. And as I said, the prohibition of the use of strength as a marketing [42] weapon can be

catered for directly. And I've used the analogy several times in this document about cars. Which is not inappropriate analogy with alcohol. And that if you want to control people from speeding it is the customary practice to prohibit people from speeding with speeding signs and police and radar traps and directly addressed to people who are speeding.

The equivalent would be to take speedometers out of cars so that people wouldn't know when they were speeding on the grounds that having a speedometer in a motor car encourages one to go faster. That is an analogy. No analogy is perfect. But I'm simply explaining the difference between what is appropriate and what is inappropriate.

Q. Are there other ways to prevent the marketing of high strength malt beverages that you're aware of besides a marketing code that would prevent the use of the term "strength" and of course just suppressing all information on product labels? Are there ways in other countries to prevent brewers from making a high alcohol strength product?

A. Well, of course one could just ban the [43] sale of any beer above a certain strength. I don't think that would be a very sensible thing to do because the public is very unlikely to buy significant quantities of high strength beer in any case.

But answering your question, that would obviously be a feasible thing to do.

Q. Why, in your opinion, is the public unlikely to buy any significant quantities of high strength beer?

A. Because in markets where they're available, including this market, that is what happens. We were saying earlier the total liquor market in this country appears to be about 3 percent. And the very high strength segment of

that appears to be about a third of that, about one percent.

So that people who are already exposed to these high strength beers are not buying them. And according to some of the evidence, I'm told people are fully aware of strength at the moment. Though I have to say that is a contradiction with some of the evidence we've seen elsewhere. So I think that's an area for dispute.

Q. Are you referring to Mr. Pirko's evidence [44] that people in this country are aware that malt liquors are higher strength from an alcohol content point?

A. I think that is true. I think that by and large, these people who are likely to drink malt liquor are aware of their higher strength.

Q. Are there higher strength malt beverages in other countries that do not enjoy the popularity of regular beers that we could analogize or look at as being similar to malt liquors in this country?

A. Yes. I mean, there are very strong, bitter beers in England. Ruddles, for example, markets a County ale which is very high strength by bitter standards. I think it's about 6 percent. But what they sell by volume is far more their ordinary ale, which is some — far more popular and sells far more.

Q. Do you know of any high strength malt beverage anywhere in the world that could be described as anything other than a fringe product in the industry?

MS. ROSENBAUM: Objection. What do you mean by high strength? I'd like to have some kind of an indication of alcohol strength. Because [45] what you think is high strength might not be the same as what he thinks is high strength.

BY MR. OADE:

Q. Well, could you tell me what define as high strength and what characterized the high strength end of

the market in other countries and indicate whether those are fringe products or mainstream products.

A. Yes. I have a bigger problem with the expression "fringe". But there are examples of relatively high strength. Karlsburg Special Brew in the UK, for example, is a high strength beer. It's about 8 or 9 percent. And that is a fringe product in a sense the volume isn't that great. But it's quite a significant sale and it is widely available.

And throughout this whole evidence I've seen, if I may make a very general point, I've been concerned that people have not taken volume into account in relationship to strength. It's crazy, especially in the beer market, as well as the other markets, to consider strength without looking at the effects on volume.

And therefore, as I said in my opinion, it is quite common in many places, including the [46] UK, for people to drink one or two beers of high strength in place of four or five beers of low strength.

But you know, you've got to look at that side by side. And therefore, in a sense there are two different markets there.

Q. Do you have an opinion as to why high strength, relatively higher strength malt beverages have not enjoyed the same popular appeal as the more mainstream products?

A. Well, the comment I made earlier was that beverages, beer is primarily a beverage of refreshment. And above a certain alcoholic strength it loses some of that characteristic.

Q. When you say refreshment are you talking about taste?

A. I'm talking about feeling thirsty before drinking and not feeling thirsty afterwards. Or thirsty—you know, it's a hot day. And you know, you're by the pool or what-

ever. And it's not the equivalent of going for a swim exactly, but if you see what I mean, it makes you feel watered down a bit, so to speak.

Q. Do you believe or do you have an opinion that the type of marketing regulations currently [47] in place in the United Kingdom forbidding marketing based on the strength of the product would also be—or has been effective in the United Kingdom and other countries? Has that been effective?

A. There isn't any marketing on strength grounds. And my reason for saying that is that if there were, there would be complaints. And there haven't been. Whether it is the marketing code, the advertising code which has directly created that situation or whether the beer marketers wouldn't have done so anyway has to be hypothetical.

All I know is that there is a code and there isn't abuse.

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[66] MR. OADE: That's all the questions I have.

EXAMINATION

BY MS. ROSENBAUM:

Q. Mr. Ambler, my name is Robin Rosenbaum. And I'm here on behalf of the Department of Treasury from the United States Department of Justice. And I'm just going to ask you some questions about the things that you just testified to.

* * * * *

[76] Q. What is your understanding of this litigation?

A. That in the mid-30's at the end of prohibition there was a concern that declaration of strength on packaging would lead to sales of beers by strength rather than other features. And [77] therefore there was litigation [sic] in

1935 prohibiting that on malt beverages but not on spirits or wine.

And that more recently there has been a concern that that prohibition is not in the consumers' interest and is not appropriate. And therefore cause for reasons which, at the time I was briefed, were not clear to me. And frankly are not clear to me now. And it doesn't seem to me helpful to inquire as to what those reasons are.

But for whatever reasons, Coors is litigating to give that information to the consumers. Which in my opinion, is the right thing to do and consistent with worldwide practice. And therefore, when I was asked about it, I was—that's what I understood.

Q. Are you aware of what the US Congress was concerned about when it initially passed this legislation in 1935?

A. I'm not sure you're being very kind about my age, but.

Q. This is meant to have absolutely no reflection on your age. Have you become aware through—

[78] A. I only became aware through the correspondence I had from Mr. Oade.

Q. And what is your understanding of Congressional concerns for this legislation?

A. Of the current Congress or the Congress in 1935?

Q. Any and all Congressional concerns that resulted in this legislation.

A. Well, as I was saying earlier, that the concerns that resulted in the legislation, so we're talking about a period of time before 1935, and it was at a time when America was coming out of prohibition, which was an attempt to use an extreme variant control theory to curb alcohol abuse. We were talking earlier about—or we will be talking again perhaps about whether America is like Europe or not.

But the same pattern which led to prohibition in the United States was happening in Europe and indeed in the United Kingdom. The reasons why prohibition came to pass in this country and did not come to pass in Europe were relatively minor and technical. And indeed prohibition failed.

Q. Maybe you misunderstood my question. My [79] question is what specifically was Congress concerned about when it decided to pass the statute at issue in this question, the statutory provisions at issue in this—

A. That's what I don't really understand—my understanding is that Congress was concerned that if strength could be declared on packaging, brewers would focus their marketing efforts on the strength of the product and would make claims for strength rather than make other claims.

Q. Is that the only concern that you thought Congress had when they passed this legislation?

A. I haven't, I have to say, given enormous attention to what Congress might have been thinking about in 1935. That was my understanding of what their principal concern was.

Q. You say their principal concern. You're not aware, though, right now of any other concerns they might have had?

A. I'm not.

* * * * *

[83] Q. Now, with regard to the UK Brewers Society, you've said that you were on the Council. What do you do as a member of the Council?

[84] A. Take part in monthly meetings where they consider the strategy for, you know, issues that come up with the beer industry. It's not unlike the Beer Institute in the United States, similar organization.

Q. What kind of issues come up?

A. Exciting issues as to whether a beer glass which holds a pint of beer should be calibrated just below there to a pint in order to allow for the head on beer. Whether a barrel should be marked with some coding system to stop people stealing barrels when they're supposed to come back. The annual submission to the Chancellor of the Exchequer not to put up the tax on beer. The public relations campaigns.

And quite importantly, coming closer back to this, the social responsibility of the beer industry. And in other words, what should be done to counter alcohol abuse.

Q. Now, when you say that this is not unlike the Beer Institute in the United States, would it be correct then to say that the people who are on this council all have interests in promoting beer?

A. The companies that they represent have.

Q. They all represent beer companies?

[85] A. Yes.

Q. Except you?

A. Not entirely except me. That International Distillers and Vintners was a subsidiary of Grand Metropolitan, which during the time I was on the council of Brewers Society, also owned Watney, Mann and Truman Brewers, which was the fourth largest brewery company in the United Kingdom.

Q. Now, you say that Grand Metropolitan also owned this beer company. But you never actually worked in that division, did you?

A. Well, again I was—that division—it's too complicated. It was a sister company and therefore I was connected with it, aware of some of their problems and issues, worked closely with them. Was I directly employed by Watney? No, I wasn't.

Q. Because in fact you were employed by IDV, right?

A. Correct.

Q. And IDV principally, I think you already discussed, is in the business of wines and liquors; isn't that true?

A. Indeed it is.

[86] Q. And wines and liquors have substantially different markets from beers; wouldn't you agree?

A. No.

Q. You wouldn't agree?

A. No.

Q. You think that the market for wines and liquors are the same?

A. No.

Q. How would you describe the differences?

A. I think there are a lot of people, I'm certainly one—who would drink both beer and wines and spirits. And therefore the consumers overlap to a very substantial extent. There are also some people who drink beer but not wine, wine but not beer and so on.

So that they are going through similar channels of distribution. In this country there is more differences in the channels of the distribution, as I've said earlier, than there are in Europe.

But your question was a general one. And you were talking about the United Kingdom at the time. So the channels of distribution are the same. The buyer of a supermarket group, for example, which are very important in the UK more [87] than here, would be the same person for wines, beers and spirits.

So the consumer groups are similar, more similar than different. They all contain alcohol. They all pay tax. They're the same buyers. There are differences. They are different products. But then there are differences within beer. There are different sorts of beer.

Q. Traditionally beers have been treated differently from wines and liquors by governments of what you define as western countries though, wouldn't you agree?

A. There have been some similarities and some differences.

Q. You would agree then that they've been treated differently?

A. I will agree with that if you will also agree that there are also some similarities.

Q. Well, you would agree, for example, that labeling of beer products as far as alcohol content was not permitted in western countries until two or three years ago?

A. No, that's not correct. It was printed —

[88] Q. By volume, alcohol by volume?

A. And it may have even been permitted. It wasn't mandatory. It is now by law. It has to be on there.

Q. So you're not aware of whether or not it was permitted?

A. Well, there's an old joke about the EC which I won't bore you with. But in Germany nothing is permitted and in France everything is allowed as long as it's not permitted. And so it goes on. The word "permitted" does not translate between EC languages.

Q. Well, then let me rephrase. If a beer company put on its label alcohol by volume percentage prior to, let's even expand it to the last five years.

A. In the United Kingdom?

Q. Well, no. Let's talk about the European community.

A. Then let's take one country at a time.

Q. Okay. Because that's what you've testified to.

A. So which country are you going to try for?

Q. Let's just go through the list. We can [89] start with the UK. Let's say that a beer company put alcohol by volume percentage on its label in the UK five years ago.

A. Uh-huh.

Q. Would that beer company be in any kind of trouble?

A. Not from a legal point of view. They wouldn't have been breaking any law.

Q. Weren't beer alcohol contents supposed to be listed by bands of gravity at that time, though?

A. Yes. And they would have had to have done that as well.

Q. Okay. How about in Spain; same question.

A. And in fact, it would have been legally impossible to stop them for a very simple reason. That what is legally packed in one EC country is more or less legally available everywhere else. That's a slight oversimplification.

But you're aware of the Cassis De DiJon case, which is an extremely important one in the EC language.

Q. Is that a beer?

A. No. It's a cordial. But the case [90] applied to all categories of products. And it's another example of the similarities, if you will.

And what it basically said was that some countries were banning the import of that product because although it was legal in France, some of the contents were not legal in other EC countries. And the EC court ruled that if it was legal in France it was legal everywhere in the EC.

And same thing applied to labeling. And indeed, beer was being imported from the continent with alcohol by volume on it. Because in France, as I said, it was on prior to that. And it would not have been possible or indeed sensible and why would anybody ever want to challenge that in a court.

Q. Let's take Sweden, for example.

A. That's not part of the EC.

Q. Well, would you consider that a western country?

A. Yes.

Q. Well, then would that country have permitted alcohol by volume percentage to be on the labels five years ago?

A. Well, Sweden has alcohol by weight. The [91] Swedes are very permissive people. I'm not an expert on Swedish law so I cannot answer your question for sure. I would have been extremely surprised if there had been any prohibition of declaring alcohol by volume in Sweden in addition to declaring alcohol by weight.

Q. Alcohol by volume has always been permitted on—I'm sorry. Alcohol by weight has always been permitted on beer labels in Sweden?

A. That is currently has to be on. When legislation was passed, I don't know.

* * * * *

[92] Q. Yes.

A. So that in other words, if you're having a fancy dinner in one of these smart rooms across the corridor, you would expect to be served wine rather than beer. If on the other hand you were at a ball game, you might expect to be served beer rather than wine. But not necessarily.

Q. And traditionally, wines will vary, although they'll vary in alcohol content significantly, most center around 10 to 14 percent; isn't that true? Leaving out fortified.

A. That is essential band. And may be a little bit higher than 14, but yes. The percentage variation of wine is, interestingly enough, less than the percentage variation of beer. Therefore you would argue there was more need to tell people about the variations of beer strength than wine strength.

Q. If you could just answer the question to the extent that you can. I mean, if you need to expand on your answer in order to explain it, that certainly is fine.

A. Just trying to be helpful.

Q. I appreciate that. Beers, however, according to your testimony, are usually between 3 [93] and 6 percent alcohol by volume; isn't that true?

A. Yes. I meant it as 3 and 9 percent. But the main volume brands, as I was saying earlier, lie between 3.5 and 5.5 in the UK. And indeed, I believe here.

Q. So the average wine starts at twice as much alcohol as the high end of the average beer; is that correct?

A. That's correct. But as I also said, you have to take volume into account when you look at strength.

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[105] Q. Would you say that the average range—when I say average, I mean where most of the sales are. Not the median, but the average range of alcohol beer contents—alcohol contents in beers in the United States is the same, less than or more than in the United Kingdom?

A. I think the average beer strength in the United States is higher than the United Kingdom.

Q. And what do you think the average beer strength in the United States is?

A. Between 4 and 5 percent.

Q. What do you think the average beer strength in the United Kingdom is?

A. Around 4 percent.

* * * * *

[113] (Lunch break taken.)

BY MS. ROSENBAUM:

Q. I think we were talking about marketing or we were just about to start talking about marketing right before lunch. So we'll just pick up there. Can you give us a definition of what marketing is.

A. I can give you a dozen. But the conventional one

has to do with satisfying consumer needs profitably.

Q. So the purpose of marketing then would be what?

A. Satisfying consumer needs profitably. Sorry, doesn't that answer the question?

* * * * *

[115] But marketing is a very subjective thing. It is about achieving what it is you want to achieve.

Q. With respect to profitability, are you aware of what size of the market share of United States malt beverage market a beer company would be interested in pursuing?

A. More than they have at the moment.

Q. So anything more than they have at the moment?

A. The more—the bigger the profitability than they have now, the more interested they would be.

Q. Let's say for example, and I'm just making up a hypothetical, a beer company has 15 percent of the market in the United States. And there's an opportunity for one percent, a one percent market share in an area in which they do not now have products. Is that something that you think a company would be interested in?

A. What do you mean by interested?

Q. Does it seem like it would be worth their time to pursue one percent of the market share?

A. And abandon the 99 percent?

Q. No, I'm not saying and abandon the 99 [116] percent. I'm saying keeping everything else the same, keeping their 15 percent where it is, there's also an opportunity to enter a segment of the market in which they are not now involved. So they could increase then to 16 percent.

A. That's an unrealistic point that you just made. If you say to me, "Assuming everything else is the same, would you like a hundred dollar bill?" The answer is yes. But life, in my experience, is not generally like that. And

you usually expect something in return for your hundred dollar bill.

And therefore, in the real world something has to give if you want something, by and large. And American beer marketers are sophisticated people. And they know that they're faced by choices.

Q. But if a company were not involved in a certain segment, it seems that if they entered a segment that had one percent of total malt beverage sales in the United States that they were not previously involved in, there would be a profit opportunity there.

Would you agree with that?

A. Not necessarily. Not necessarily. How [117] can you assume that the niche that you want in is a profit opportunity? By and large, things that you're not currently doing are less profitable than things you are currently doing.

But I mean, since you're reaching after generalizations I'll give you one. Would you like to know why?

Q. Well, you have earlier testified, for example, that the current trend is—and correct me if I'm mischaracterizing what you've said—but as I understand your testimony, you have said that the current trend is towards entering all the segments of the market; is that correct?

A. There is a current trend to increase the range of products. This is across a number of categories. I'm not specifically specifying beer here. To extend the range under a single brand name. That's what the French call flankering.

And I used the example in my opinion that Alpo, which was more or less only in canned dog food four years ago now has a range of all other kinds of dog foods as well. Because they're trying to fill categories as a whole, not just with the can.

Q. Well, let's talk about beers. Would you [118] say, for example, that light beers would be an incident of this flankering?

A. Yes, in a sense. That is to say that Miller had its regular style of beer before it had Miller Lite. And then it elected to put out Miller Lite in the same bracket.

The question that you're posing is one of the fact that people look at the variety of products under the same brand name or different brands in the same category, which are two different choices they offer the consumer.

And they are faced by choices as to whether you have—you spread your energies across many different ones or you focus your resources and your time and your money on fewer. And these things go in trends.

And as a generality what we're currently in a trend, and partly due to recession, there is more range extension going on. And we will see that trend change and go backwards. Sort of goes up and down a bit.

But if we're looking at a long-term issue like we're looking at today, which is long-term effects of putting numbers on beer packages—

Q. Well, that's actually not the question [119] right now—

A. The question is relevant. I'm sorry I was—

Q. That's okay. In the type of situation where we have flankering, if I can use that word, going on right now, every time a new segment is sort of targeted separately, is there a risk that it's going to take away from an already existing segment?

A. That's what I meant by when you asked me earlier if you would always add and I said it's a choice. Because when you add something there's a risk that you will take away energy and focus and money from something else. So you have to weigh that.

Q. So if one's competition is investing in a new segment and it's taking business from the main area of production of your own company, might you then be interested in pursuing an additional product in the other segment?

A. You might. But you would look at that probably rather differently. And this is precisely the reason why the changes that we're thinking about are unlikely to have the effect that you're worrying about. Let me explain.

[120] If a major beer company with a major brand in the mainstream segment, which is let's say 5 percent alcohol, elects to put a massive effort into a beer at 7 percent alcohol, then that effort to some extent is going to come from their activity behind the mainstream brand.

If the mainstream brand is selling whatever number of barrels it is, even the success you quoted as a quarter of million barrels of St. Ides may open up your mainstream brand to the competition to attack that segment. And that's probably what the competition will do.

So you would be very reluctant to imperil your mainstream brands with their existing strength to go after high strength which is relatively small opportunities. Because the gain is unlikely to be worth the risk.

And quite apart from anything else, you can do that under existing legislation. Which is, you were saying earlier, people are aware of. Not really. They're not doing it now and wouldn't be doing it then.

* * * * *

[131] Q. Well, how about Brian Baldock; have you heard of him?

A. Yup. He's the chief executive of the Guinness Brewing Company.

Q. That's correct. He's the chair and managing director of Guinness Brewing, world-wide. And would it

surprise you to hear that he said, "The beer industry is more regionalized than some others like the food industry and is likely to remain so for some time"?

A. And I would agree with that. And I have not at any time today said that beer is a global business. I said the exact opposite. I said that beer, more than most categories, is very national. Indeed, if you want to push the point, in Germany, for example, it is very regional. And in the UK, very regional. And the Wolverhampton and Dudley Brewing Company is a very regional brewing company. And we agonized about whether we could close the Dudley Brewery which is only 20 miles from Wolverhampton Brewery. We worried about that.

So I have at no stage in the day tried to [132] imply that the beer business is global business, nor is it identical in all countries.

What I have said is if you look at marketing in general, which is what you were previously asking, there are global businesses now like Proctor & Gamble. And if you look at the overall tendency, it is towards globalization. And the Guinness Company is moving in that direction.

And as Baldock rightly said, it is a slow process and tastes are going to be different for a long time to come. They bought, if not the biggest, one of the biggest Spanish beer companies. And their long-term ambition is to be a global beer company. He may not have said it in public. I'll do it for him.

Q. Is the United States a regional beer market?

A. Big region.

Q. So yes, it is, but it's one big region?

A. (Nodding.)

Q. Would you agree with that?

A. Yes. Substantially, yes.

* * * * *

[137] Q. Is it your opinion that in order for a strength war to be going on, alcohol consumption must be increasing?

A. In order to answer that question I need to know what your concept is of a strength war. Tell me what a strength war is.

Q. Why don't you tell me what you think a strength war —

A. I'm sorry, it was your question and your language. And therefore, I need to know what you mean by your language in order to answer your question.

Q. I understand that. And I would like to ask the question as you understand a strength war to be.

A. Are you withdrawing your previous question then? This is a new question?

Q. I'll withdraw it for the time, asking you what you define a strength war to be. And then after having defined it, if you could tell me whether you think that in order for a strength war to be raging alcohol consumption must be increasing.

[138] So let's start first with what you think a strength war is.

A. I think a strength war is fantasy. And I've had a lot of problem with it. And as I explained earlier in my testimony, in order to give an opinion I had to come up with some reasonable understanding of what was intended. But I did put the expression in quotes in my opinion because I had a lot of problem with it.

And the answer to the question I gave earlier, which I can't give you exact wording, but roughly to the effect that the concept was that marketers would shift their main appeal to the public from whatever the appeals are at the moment onto the alcoholic strength. And would therefore climb one above the other raising their strength and raising their appeal against that strength.

So that the cumulative effect would be for everybody to raise the alcoholic strength of the brands on a cumulative sort of basis.

That's what I understood you to mean in the absence of any further clarification. But in order to answer your questions on this subject of strength wars, I think I need to have a clearer picture as to what you do mean.

[139] Q. That is fine. If you understand that to be a strength war, then within that context the question is do you think that in order for a strength war to be occurring, alcohol consumption must be increasing?

A. Well, now in order for the strength war to be occurring there has to be some means of communication from the manufacturers to the public of the benefits of this higher strength, right? And I'm not quite clear in this, as I see it, fantasy, how the communication of these higher strength appeals are going to take place within the marketing environment that we are looking forward to, assuming Coors win their case.

Namely, that they will be allowed to put the strength on the package, but will not be allowed to make any claims for strength of any nature.

Q. I don't think that really answers the question. Let me see if I can explain it a little bit better.

Earlier you've said that even the people who do drink higher strength beers are drinking less of them. Right? You said you have to consider volume when you're talking about [140] strength; is that correct?

A. I certainly said you have to consider volume when talking about strength because they have to be taken together. And I was saying that the typical behavior of people drinking a stronger alcohol by volume beer is to drink less quantity.

That isn't a standard that everybody does it, which is

what you just implied. I was talking about what the normal thing is.

Q. What I'm trying to figure out then is are you making a link between drinking more higher strength alcohol and strength wars?

A. I frankly don't understand the question.

Q. I don't understand the significance of the point that you've made that people are drinking less in amount.

A. Well, let's take the French wine market, which may be helpful in this case. Which is a very similar situation.

Q. Well, actually why don't we take the beer market. Because I think you've actually given us some examples in the beer market. And that way we'll stay directly hopefully relevant?

A. But wine market is totally relevant as well. It's beverage alcohol. The point I'm [141] making is that whether it's the French wine market or the British beer market, the overall size of the market in volume terms appears to be going down. And people are drinking better quality. Which will also mean that they will tend to be drinking slightly higher alcohol by volume strength.

They're drinking that not because there's a strength war going on, not because of any claims being made for it, not because anybody's raising the strength of their beer or wine, as the case may be. But as it so happens, the more premium and better quality products tend to be also more alcoholic.

Now, it would be quite wrong, and I made this point in my opinion, to draw the conclusion that that was in any way linked to the declaration of the strength on the pack.

And it's particularly interesting in this context that the strength—and this is where the French wine market is of relevance, if you'll excuse me. That table wines in France have to carry the strength and the quality wines do not

have to carry the strength. And people are drinking, as it happens, higher strength quite [142] unknowingly. What they do know is they're drinking better wine.

Q. Once again, the question is is there any relationship whatsoever—and maybe the answer is no—is there any relationship between the amount of alcohol people are consuming and whether or not a strength war is occurring?

A. I can't handle the strength war fantasy. All I can tell you is, my best answer to the question is there will tend to be a correlation between volume and strength. And there's also a correlation between strength and quality.

And therefore, if people are drinking up in quality they will coincidentally be drinking up in strength. And that is not a strength war by any definition. And probably drinking slightly less. Because at the end of the day people have so many dollars in their pockets to spend on drinking. And if they're going to pay more for something, then they're probably not going to be able to drink as much of it.

Q. Okay, let's just drop the subject for a second. You keep referring to strength wars as fantasies. Are you of the opinion that a strength war can never exist?

[143] A. No. It is possible.

Q. Okay. Could you describe for us how a strength war would exist, in your opinion?

A. If—now this is very hypothetical. If the environment in Country X—this is not likely to happen in the United States—in Country X said you can—you have to put the strength on the packaging and you are not allowed to make any other claim for your product other than strength, therefore the only thing you can compete on is the strength and price. Under those circumstances a strength war is quite likely to happen because the marketers don't have any choice.

That is the exact opposite of the situation we're faced

with here where the marketers are specifically prohibited from using strength as an appeal.

Q. Okay. Now, in your situation that you've given as a hypothetical in Country X, let's say that a strength war is going on.

Does it necessarily follow that the amount of alcohol consumed in Country X will be less than, more than, or the same as, or is there no relationship to what people were drinking before the strength war occurred?

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[145] Q. Okay. I understand that you think that if you put strength up, that people will probably drink less. And that there's a weak relationship?

A. There's a weak relationship.

Q. But I'm asking with regard to whether or not a strength war going on. Is one of the signs of a strength war going on, one of the symptoms, if you will, that people are drinking less; is that what you're saying?

A. I have a great problem being an expert in strength wars because I've never seen one. And I don't think anybody else has.

Q. So you're not an expert in strength wars?

[146] A. Nobody can be an expert in strength wars because there have been no strength wars. And the whole basis of my testimony is that there aren't any strength wars.

And the whole basis of the US government's position, as I understand it, is that putting alcohol by volume on a can creates strength wars. And what I'm trying to tell you is that those places that have done it haven't had strength wars.

* * * * *

A. I have consistently said that I regard my primary expertise in beverage alcohol drinks.

Q. And wine and liquors would be a part of that?
[147] A. Indeed.

Q. And to your knowledge, there's never been a strength war in wine or liquors either; is that correct?

A. I've certainly said that for beer. And there's reasons for beer. Let me think about the answer. I've never seen any strength war in wine. I've never seen a strength war in spirits.

But it is true to say that people have marketed some higher proof spirits, not very successfully, on a strength platform. But it hasn't been a war and it hasn't been successful.

So I would claim there have been no strength wars per se. I mean, what's happening in the spirits realm is that the strength of Bacardi in the UK has come down. The strength of Gordon's gin in the UK has come down. And I think you'll witness the strength of spirits in this country coming down and they already have to some extent.

So if there is one of these fantasy strength wars going on, it's a lower strength war with the strengths coming down. That isn't a strength war. I mean. That's just people adjusting to the marketplace.

* * * * *

[150] BY MS. ROSENBAUM:

Q. Would you think that if a beer put on its label, "number one strongest malt liquor", that it was engaging in selling tactics on the basis of strength?

A. Say it once more.

Q. If on its label it wrote, "number one strongest malt liquor", would that be engaging in tactics trying to sell it on the basis of its strength?

A. I'm sort of trying to give you a clue in the question I asked that you didn't answer. And I appreciate it's my job to answer the questions. But I'll put it more bluntly.

My statement that strength wars for beer cannot exist in the UK or the USA is based substantively on the fact that the regulations specifically prohibit people using that very claim.

Now, if a relatively minor brand flouts the regulation and is not put in its place by the regulatory authorities for several years, then that is not supporting your case for these mythical strength wars. It is purely pointing out that the regulations which are in force were not [151] applied. And if you don't apply the regulations which are intended to prohibit something, then of course the something that they're supposed to be prohibiting may take place.

But you know, you're asking me to speculate about a situation where United States doesn't apply its own regulations. I don't want to do that.

* * * * *

[152] Q. Again, the question is—and let's just lay a foundation here. Can a strength war occur when there are no regulations limiting what can be put on a beverages label, an alcoholic beverages label?

A. You asked me to speculate earlier about circumstances in which a strength war could happen. And I did that. And I speculated about a condition where strength was the only appeal that a brewer was allowed to make. I can't really add to that because we are in fantasy land.

I can only address myself as a marketing person, as I was saying earlier, to situations which is the bread and butter of marketing, which [153] are real periods of time and real categories and real countries.

Q. So it's your opinion then that the only time a strength war can ever exist is when beer companies are forced to market their product on the basis of strength only?

A. That wasn't what I said. Let me say it again.

Q. Okay.

A. You invited me to speculate about a situation in which a strength war could take place. I didn't say that that was any situation. That was in your question, not in my answer. I did my best to carry out that speculation in order to try to be responsive to your question.

I'm not prepared to go further into this unreal world. I'm very happy to answer marketing questions. But all marketing is about real world situations.

I was making the point earlier this morning the problem I had with Tom Pirko's research was I found it to be hypothetical. And much of your line of questioning this afternoon has been so hypothetical that, helpful as I try to be, I have to say that it is not related to the [154] real world in which consumers and beer brands are being used.

* * * * *

[169] Q. Okay. Now, you also said that within the United Kingdom higher strength beers have gained market share relative to lower strength beers since alcohol content information has been printed on the pack; is that correct?

A. I was very explicit in my opinion that these two things had happened, but I was reasonably certain that they were unconnected. So your use of the word "since" is misleading.

Q. Well, in fact, not making a casual connection, speaking only in terms of timeframe, is it not true that there has been an increase in market share for higher strength beers relative to lower strength beers since the time that alcohol content information has been printed on the packages? Without asking you to draw any kind of casual relationship.

A. There has been indeed a trend towards drinking better quality beer in recent times. And there has also been

a trend toward putting more alcohol information on the package, true.

* * * * *

[175] Q. Okay. Now let's talk about with regard to countries other than the United Kingdom. Now, I know that you refer to the CBA for your information about strength wars in the United Kingdom. And I know that it's a worldwide base.

[176] So did you refer to the CBA for your information about strength wars in countries other than the United Kingdom?

A. Well, I didn't refer to it for strength wars because, as I've been saying all this time, strength wars are a fantasy. I take the documentation on a monthly basis and I read it from cover to cover. From front cover to back cover. And I don't find in it anything on strength wars. And on that basis I suggest to you that they don't exist. Amongst other bases.

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[209] Q. If beer companies started producing higher alcohol products and that information, the alcohol content information were available on the labels and in advertisements, and people started buying higher alcohol products in big enough numbers that beer companies manufactured more of these higher alcohol products, without advertising on the basis of strength but merely by putting the number on the can and in the advertisements, would that constitute a strength war under your understanding of what a strength war is?

A. It would be associated with that. I mean, it's an interesting concept because we're talking about the use of the word strength war in the sense we're talking about earlier where people were escalating the strength of

brands. There's a difference between escalating the strength of existing brands and introducing new brands at higher strengths. And in this particular question you've just asked you were talking about the second, not the former. And I was embracing both in my definition.

So that in a narrow sense, the word on your hypothesis, not on my — by your definition there would be an increase in sales in the higher strength categories. Because that's what you asked me to imagine.

[211] Q. Right.

A. Therefore, by definition there is a strength war because you've defined there to be a strength war, not because I'm agreeing with you.

But I would draw to your attention the slight element in fantasy in that because you're conducting a strength war with no bullets.

Q. Are you saying that advertising is the bullet?

A. Yes. I'm saying that in order to stay with this analogy you have to see communications to the consumer, if you like, as the artillery shells or the bullets or whatever warfare. That is how you achieve your objectives, by making the consumer aware of your appeals. Now, if you can't make the appeals, that is like fighting a war with no bullets. It's a great war, but it's not exactly what people think about.

Q. So then it's your impression that people don't care about what's on the labels as far as alcohol content?

A. I didn't say that.

Q. People do care about what's on the labels as far as alcohol content?

A. They care to a limited extent. And [212] indeed what I have about Mr. Pirko's research earlier — I'm never black and white about anything and there were good pieces in the research as well. And one of the pieces that I

associate with is his commentary about the fact that people are interested but not enormously interested. There was a low level of wishing there to be a war.

Q. Is advertising the only bullet that can be fired in a marketing war? A strength war, I should say.

A. A strength war. There has to be communications. And of course what is on the package is part of that communications, but a small part. It's not really intrusive. You know, if you pick up a can in a certain way you'll never see it.

And the much more — I mean, the reason why people advertise is because information on the can isn't enough. I mean, if it was enough you wouldn't go on about it, would you.

* * * * *

[279] Q. Okay. Now, earlier when you were talking about less restrictive ways of addressing this problem, I think you said that one could ban the making of beers above a certain strength and that would take care of the problem; isn't that true?

A. (Nodding.)

Q. Don't you think that would be more restrictive than not permitting these beers to put the alcohol content of the products on their labels and in advertising?

A. I don't. And I also said when I made that comment earlier that I thought that that would be an unnecessary thing to do. Because the evidence was that the consumers weren't interested in those things.

And the reason why it would not be more restrictive is as follows. If you were banning a tail on the bell-shaped curve and let's say for argument's sake you were banning one percent of the market, you were also providing more on 99 percent of the market. So it's a matter of opinion as to whether that would be more or less restrictive. But it

would also be appropriate.

[280] And it's a very interesting comment this one thing about that it would also be appropriate to the end purpose. The end purpose of all of this, as I understand it, is that there should not be high strength wars. You want to ban a war you ban the substance of the war, you don't ban something irrelevant to it.

Q. So you think that—I mean, I just want to be sure I have this straight. You think that it is less restrictive to ban the sale of the product all together than to simply not permit beer companies to put the alcohol content by volume on the label.

A. Well, the word actually is extensive, if I may say so. And extensive precisely means covering a wider ground. And if the object of the exercise is to stop extreme high strength beers, then the least extensive thing to do is to ban extreme high strength beers.

Q. Okay.

MR. OADE: I believe you're referring to the no more extensive than necessary test of the Supreme Court that you quoted in your report; is that correct?

THE WITNESS: I am. Thank you.

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[293] FURTHER EXAMINATION

BY MR. OADE:

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[295] Q. You were also asked some questions about warning labels. Are you aware of warning labels in this country with respect to malt beverages?

A. Yes.

Q. And what is your understanding of what they say?

A. I can't give you off the top of the head a segment

of what they say. And there are, I think, four alternative versions which rotate.

Q. In your judgment what is more effective, a warning label or information on actual product alcohol content?

A. I'm not—I mean, I was asked earlier if I supported warning labels in the United States. And I said for technical legal and so on reasons I did. That isn't to say that I think they are a particularly—I'm in favor of educating [296] consumers about the good and the problems of alcohol. And therefore, to the extent that warning labels are educational, that's one of their advantage.

It is inconsistent to warn people about alcohol at the same time on the same pack as not to tell them how much alcohol is in that pack.

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[AMBLER DEPOSITION - EXHIBIT 1]

Re: Adolph Coors Co. vs. Secretary of the Treasury,
Case No. 87-Z-977

Opinion of Timothy Felix John Ambler MA SM FCA

1. Education, qualifications and experience

1.1. Currently, and since 1991, Senior Research Fellow at London Business School specialising in international marketing.

1.2. Until then, with International Distillers and Vintners Ltd ("IDV") for 28 years. IDV is now the largest wine and spirit company in the world (by volume) with operations in over 30 countries. It is part of Grand Metropolitan PLC.

1.3. During the 70s, Marketing Director of IDV's UK company. During the 80s, Managing Director IDV UK, then Marketing Director IDV worldwide and finally Joint Managing Director for three years.

1.4. From the mid-70s responsible for IDV's social aspects of alcohol policies, initially in the UK and then worldwide.

1.5. Contributed to the creation of first UK alcohol advertising self regulation code in 1975. Chaired the Committee which prepared the first amendments to it five years or so later and contributed to the only further revision in the late 80s. The code is part of The British Code of Advertising Practice and forms section C.XII. A copy is attached as Appendix 1. The Code is administered by the Advertising Standards Authority ("ASA"), an independent body funded by the advertising industry.

1.6. A member of the Social Aspects Committee of the UK Wine and Spirit Association for about six years including three as Chairman.

1.7. On the Council of The UK Brewers' Society for nearly ten years and currently a Director of Wolverhampton and Dudley Breweries PLC.

1.8. Contributed to the formation of the Centre for Information on Beverage Alcohol ("CBA"), a worldwide database concerned with social, medical and all forms of alcohol information. CBA is funded by the leading international beer, wine and spirit groups.

1.9. MA in mathematics from Oxford, SM in business administration from Sloan School MIT, Fellow of the Institute of Chartered Accountants of England and Wales, Fellow of the Royal Society for Arts and Industry, London.

2. Facts

2.1. The following Western countries legally require, or will shortly require, the disclosure of alcoholic content in the form of % alcohol by volume ("ABV"):

Australia, Canada, UK and the other 11 countries of the EC, Japan, New Zealand, Norway.

Note 1: "Western" is defined to mean all first world countries and to exclude the second world (those now or previously communist) and Latin American/third world (developing countries of Africa and Asia).

2: Neither this nor the following list is claimed to be comprehensive. Other countries may also have alcohol disclosure regulations for beer.

2.2. The following Western countries legally require, or will shortly require, the disclosure of alcoholic content in some other form:

Austria (wort content), Iceland (weight or volume), Sweden (alcohol by weight ("ABW")), Switzerland and Leichtenstein (ABW).

2.3. Much of this regulation is of quite recent origin. The current EC law took effect, for example, on 1 May 1989 for beer cans.

2.4. The worldwide trend is to supply the consumer with more on-pack information, not just strength, in a less confusing way. For example: in the 1970s no indication of beer strength was legally required for UK consumers. Then legislation required strength to be declared in bands of "original gravity". Excise taxes were historically levied on original gravity which therefore provided a convenient measurement framework. Consumers did not, of course, understand what original gravity meant. Improvements in beer technology, changes in tax collection, EC harmonisation and consumer demands for clarification together caused the current EC legislation based on ABV.

2.5. As the same time, there has been increasing attention to the regulation of advertising and other marketing practices. A number of advertising codes prohibit the use of alcoholic strength as an attraction. The UK code C.XII 5.4.1 states "While it is legitimate for them to give factual information about alcoholic strength, advertisements should not suggest that it is sensible or desirable to prefer a drink merely for its *high alcohol content* or intoxicating effect. To that end, high alcohol content should not be the principal basis of the appeal of any advertisement." The Danish Code, implemented in February 1991 states that advertising must not "emphasize a strong, high or higher

content of alcohol". October 1991 saw guidelines in Eire similar to the UK proscription on using strength as an inducement.

2.6. In the UK Code, there are also restrictions on "challenging" consumers or showing drinking as a sign of acceptability, maturity or masculinity any of which might be linked with stronger beers.

2.7. In the UK there is no evidence that greater on-pack information of alcoholic strength has lead to any "strength wars" as envisioned by US regulators. There has been a wider provision of both higher and lower strength beers to provide greater consumer choice. Premium, ie higher strength, lagers have been gaining share relative to lower strength lagers but they have not been marketed in defiance of the Code. There are plenty of agencies and individuals hostile to alcohol who would be quick to complain of infringements. The ASA complaints process is well known and effective. Beer volumes have been decreasing and it is likely that consumers are simply seeking less quantity but better quality. In the same way, total wine volumes have been decreasing in France whilst the share of quality wines has been increasing. It seems most unlikely that either trend is influenced by on-pack alcohol strength information.

2.8. UK younger male consumers, who account for the vast majority of total beer consumption, now consciously distinguish "session drinking", where they will stay in a pub or a home for several hours and therefore require a low strength ([about 3.5%] ABV) beer, from a "quick drink" where they will take a stronger (over 5% ABV) lager but limit themselves to one or two cans.

2.9. In Australia, the alcohol by volume requirement is governed by the 1987 Food Standards Code. Current

Australian concerns are not with any abuse flowing from this information but the reverse: the debate is how to provide more relevant information for the consumer. In other words should a "standard drink" be defined in terms of grams of pure alcohol and labelling referenced to grams or "standard drinks".

2.10. In Canada, a "standard drink" has also been defined as part of voluntary trade action but at a higher level than Australia. Advertising and marketing practices are highly regulated. Whilst requiring alcoholic strength to be shown quantitatively, other strength claims are not permitted and there is no evidence of "strength wars". Total per capita beer consumption is declining.

3. *Opinion*

3.1. It is illogical to require a warning label on alcoholic drinks and at the same time provide no quantification of the alcoholic content. Providing the warning indicates that the consumer has a rational concern to take care and limit intake for his or her own health/safety or that of others. Beer strengths normally range from 3% to 9%. The same rational concern would need to know which beer is twice the strength of another. Whilst it is true that a minority may perversely take higher strength as a challenge, the same argument could apply to warning labels, ie that they should not appear because they would incite irresponsible drinkers to consume more.

3.2. Given the risks of abuse of alcohol there is a public duty to inform consumers, in clear and unmistakable terms, how much alcohol they are consuming. Whilst I have not seen research directly comparing the knowledge of alcoholic content, within a single study, between the USA and other countries, I have seen research showing a

dangerous ignorance of the alcoholic strength of beer by younger US consumers. For example Martin et al (Jnl of Drug [Education], 21-2, 1991 pp [135-143]) found that 113 young adult drinkers' estimates of alcoholic strengths of malt beverages were less accurate than those of other beverage types. Many younger drinkers, prior to the introduction of warning labels, were unaware that beer was alcoholic at all. I use the word "dangerous" because of the possible consequences of this ignorance for road accidents, water sports and the use of dangerous machinery in particular. The widespread use of warning notices of all kinds has made them commonplace. One might question the value of a generalised warning without quantification. The general European view is that warning labels are not productive but information on strength is.

3.3. I do not argue by analogy but the points above might be illustrated by reference to speedometers in cars. How would the US Government respond to the suggestion that speedometers were withdrawn from cars on the grounds that they might encourage irresponsible drivers to speed? The risk of incitement to drive faster, or sell faster cars, is substantially outweighed by the need to provide accurate information. Speeding could at best only be indirectly controlled by the removal of speedometers; there are more direct, and therefore more effective, means of control.

3.4. There is a clear distinction between the provision of factual numeric information on packaging and the use of value laden semantics, such as strong, export or heavy. My understanding of this case is that Coors seek permission for the former but not the latter.

3.5. It is also illogical to consider strength other than in the content of quantity. Few could argue any harm in

drinking 6% ABV beer rather than 3% ABV if only half the quantity is consumed. (I am aware that there are some marginal alcohol absorption differences caused by volume but the point is illustrative.) When Miller introduced Lite Beer, success turned out to depend on steelworkers in Pennsylvania becoming convinced they could now drink more beer. In my opinion it is important to provide strength information to consumers so that they can adjust their volume intake appropriately.

3.6. Whilst, as indicated above, communication of the unadorned, quantified facts of alcohol content is, in my view, a modern public duty, given the dangers of ignorance, there are legitimate concerns with the means of such communication, ie the regulation of marketing practices. In this respect I was impressed by the US Supreme Court criterion of "*no more extensive than necessary*". It may be helpful briefly to review the background to the voluntary codes of marketing practice which have grown in a number of western countries in the last twenty years precisely to meet this "no more extensive than necessary" consideration:

3.6.1. Why are they voluntary or self-regulating? We are dealing here with subtle shifts of language, visual images, fashions and social values. What is acceptable to the community in one decade is not in another. After considerable debate, the EC was persuaded that legal regulation was too cumbersome, slow and inflexible to deal with the nuances involved; better to use the threat of legislation against the advertising industry to ensure that they cleaned up their act. Whilst each country now has its own codes, one can expect increased harmonisation across countries and product categories, eg in EC countries, the same codes apply to all forms of alcoholic beverage.

3.6.2. If they are "voluntary", are they unenforceable, ie can the less responsible marketers opt out? Clearly there are antitrust implications in some companies coercing others to comply. The simplest solution is for government to require compliance with that country's Code even though it is administered independently. But how? In practice the means of making Codes enforceable vary from place to place but, in one way or another, that is necessary. Otherwise the responsible companies both limit themselves competitively in the market place and have the costs of administering the Code. They are thus doubly penalised as compared with less responsible marketers.

3.6.3. In conclusion, the increasing western practice is for government to persuade marketers to achieve social ends through self-regulation. This may require accommodation on anti-trust or legal (tort) considerations. Some sanction is needed to achieve compliance by those marketers reluctant to participate. *My opinion is therefore that the prohibition of strength declaration is more extensive than necessary* is based on the observation that other countries frustrate any potential "beer strength wars" through better tailored and more direct means.

3.7. There have been no "alcohol strength wars" resulting from the declaration of alcoholic strength on packaging. Whether that is due to the codes of marketing practice that largely parallel strength declaration in Western countries is not possible to determine with any certainty. It makes sense to encourage responsible marketing in any case.

3.8. It is also my opinion that declaration has widened the choice of strengths available to the consumer and that has been a benefit. The drive to offer consumers *lower*

strength options, which some believe began with Swan Light in Australia, may have encouraged more explicit strength information or vice versa. Either way it is beneficial.

3.9. Taking the questions you asked in the same order:

3.9.1. If alcohol content information is disclosed to consumers in product labels and advertisements, would this result in brewers marketing beer based on the alcoholic strength of the product? Why or why not?

It is possible that US brewers might do this if there were no other considerations or restrictions. In the prevailing climate, which expects responsible marketing by all manufacturers and importers of beverage alcohol, that seems unlikely, at least by the five major brewers who account for 90% of sales. There is a beer advertising code of practice and also a Century Council code, which applies to Stroh, both of which would prohibit strength claims, as would the existing semantic regulations which are not being challenged. In short, my opinion is "no" and even if I am wrong, relatively minor changes to codes would take care of the problem.

3.9.2. Based on experiences in other Western countries, would brewers seek to increase the alcohol strength of malt beverages if accurate alcohol content information was disclosed to consumers? Why or why not?

As part of the entrepreneurial pattern of US business and consumer demands for maximum choice, some higher strength beers might well be offered but more as fringe products. It is most unlikely that these would give rise to significant problems as consumers would drink less volume of them. The overall impact of a change in legislation allowing quantitative disclosure is most likely to be

minimal with any harmful effects being more than offset by the benefits.

3.9.3. Is disclosure of accurate information about the alcohol content of malt beverages likely to increase or decrease the use of descriptive product labels such as "power", "high test" or "strength? If the answer is affirmative have other Western countries been able to successfully regulate such activity through the use of marketing codes?

Disclosure of quantitative strengths would have no impact on semantic or descriptive expressions, not least because these are regulated separately. Western countries such as the UK do use codes to prevent the use of strength as a marketing weapon. See above.

3.9.4. What has been the experience of other Western countries with respect to the disclosure of alcohol content information of malt beverages? Are such disclosures generally required or permitted? If so, have these Western countries experienced high alcohol content marketing wars as a result of such disclosures?

Accurate disclosure is now the norm in Western countries as requirements of their governments. No alcohol content marketing wars have resulted.

3.9.5. Is there a noticeable trend toward consumption of higher alcohol malt beverages on a per capita basis in those countries that have permitted or required alcohol content disclosure of the product? For example, when such laws were required in the United Kingdom, did this result in any trend toward increased consumption of malt beverages with higher alcohol content? As noted, the trend in Canada appears to be just the opposite.

In the UK, there has been an increase in share, within a declining market, of higher strength beers. Standard

English beer is generally low in strength (3%-4% ABV). It would be wholly wrong to attribute that increase in share to label information changes. It is part of a wider trend towards premium or higher quality products but in lower volume. Some link reduced volume intake with the decline of manual labour and the associated reduced need to replace liquid and minerals. UK beer consumers are well able to distinguish quality without the prompting of %ABV and have had to do so over the centuries before that information became available.

In other countries there is also diversity of consumer choice but no evidence of higher strength information promoting greater consumption of high strength product. In North East France and Belgium, there are truly high strength beers, 10% or more, but these have always been curiosity products with no wide market. Similarly English high strength beers, such as Barley Wine, have fallen out of favour and are now hard to find.

TIM AMBLER MA SM FCA

Currently Grand Metropolitan Senior Research Fellow at London Business School. Prime focus for research and teaching is the management of international brands through a programme named PAN'AGRA.

Previously:

- 1957-60. Read Mathematics at St John's College, Oxford.
- 1960-63. Qualified as Chartered Accountant with Peat, Marwick, Mitchell & Co.
- 1963. Joined International Distillers and Vintners Ltd ("IDV") as accountant for the fine wine division. Later General Manager for bottling and distribution.
- 1968. Science Research Council funded Master of Science degree at Sloan School, MIT. majored in marketing.
- 1969. Marketing Director IDV UK, then an unprofitable business.
- 1972. IDV bought by Watneys, and three months later by GrandMet.
- 1977. Managing Director IDV UK.
- 1982. Marketing Director IDV Worldwide. IDV UK now IDV's second most profitable business.
- 1982-90. At various different times responsible for IDV's businesses in 34 countries, in the last three years as Joint Managing Director. Principal geographic focus on N America.

Personal responsibilities included strategy, acquisitions (notably Heublein, individual brands and controlling interest in Cinzano), marketing (Smirnoff and Croft Orig-

inal in UK) and contributing to new brand development (Baileys UK, Malibu, Piat D'Or, Archers and Aqua Libra).

Currently also a consultant to GrandMet, The Century Council in Los Angeles and a director, Wolverhampton & Dudley Breweries PLC.

Age: 55 Married with one son.

Other interests: Opera, garden demolition and reconstruction.

3 August 1992

[Appendix 1 to Ambler Deposition]

Section C.XII

Advertisements for Alcoholic Drinks

Preamble

1. This section is concerned with accepted restraints upon the advertising of alcoholic drinks; and in what follows, except when the context does not permit, words such as 'advertisement' and 'drink' are to be understood as relating to alcoholic drink, and the way in which it is advertised.
2. The rules in paragraph 5 below are based upon those which were drawn up by the drinks industry in 1975 and which appeared most recently as Appendix 2 to the seventh edition of the Code. As they appear here, they have been substantially reorganised and redrafted and contain new material.

Scope

- 3.1 This section is concerned with the promotion of drinks the alcohol content of which exceeds 1.2% by volume. It applies to:
 - advertisements for such drinks;
 - sales promotions for such drinks, and sales promotions in connection with which such drinks are distributed, whether as gifts or prizes, or otherwise; and
 - other advertisements, to the extent that they show people drinking or give particular emphasis to the name or visual identity of any brand of drink.

- 3.2 As appropriate, advertisements and sales promotions within the scope of this section are required to conform also to all relevant provisions of the rest of this Code.

Interpretation

- 4 Both the drinks industry and the advertising business are concerned to ensure that, in appealing to the many who buy and enjoy alcohol in moderation, advertisements avoid anything that can reasonably be seen as likely to lead to the adoption of styles of drinking that are unwise for the drinkers or a source of social and medical problems for the community. No set of rules can cater for every circumstance, but those responsible for the rules which follow understand the power of alcohol to do harm as well as good. They accept a commensurate responsibility for ensuring that these rules are always applied in the spirit as well as in the letter. They do not believe advertisements need to be devoid of humour, but they will not tolerate the use of humour as a way of circumventing the clear intention of the rules.

Rules

- 5.1 Advertisements should be *socially responsible* and should not encourage excessive drinking. In particular, they should not exploit the young, the immature, or those with mental or social incapacities.
- 5.2.1. Advertisements should not be directed at *people under eighteen* whether by selection of the medium or context in which they appear, or by reason of their content or style of presentation.

- 5.2.2. No advertisement should feature any *characters*, real or fictitious, who are likely, whether because of their apparent youth or otherwise, to attract the particular attention or admiration of people under eighteen and thereby, in any way, to encourage them to drink.
- 5.2.3. People who are under eighteen should not appear in advertisements except when their presence would be neither illegal nor unusual; for example, as participants in such events as *family celebrations*. When they are so shown, it should always be obvious that they are not drinking.
- 5.2.4. *People shown drinking* in advertisements should always clearly be adults; and to ensure that this is the impression created, advertisers should not engage as models people under twenty-five, or people who look as though they may be under twenty-five, if these people are to be shown in any advertisement either drinking or about to drink.
- 5.3.1. Advertisements should not suggest that drinking, or the choice of a particular drink, leads to *social acceptance* or popularity; or that alcohol is the main reason for the success of any event or occasion.
- 5.3.2. It is legitimate to promote the consumption of particular drinks on particular occasions, or under particular circumstances (for example, champagne at *celebrations*), but if this is done, the advertiser must take care not to allow the implication to be drawn that the choice of a given drink is anything more than an evidence of the good taste of the drinker—that, for example, it can make him better liked or more successful than

those who do not drink, or who drink something else.

- 5.3.3. No advertisement should be capable of being understood as a *challenge* to people to drink. In particular, suggestions that drinking is an essential attribute of *masculinity* should be avoided, as should anything which suggests that the brave, the tough and the daring owe these characteristics to their drinking. No advertisement for a drink should depict or refer to it in the context of aggressive or anti-social behaviour.
- 5.3.4. No advertisement should suggest that the *femininity* or attractiveness of women is enhanced by drinking or by the choice of a particular drink.
- 5.4.1. While it is legitimate for them to give factual information about alcoholic strength, advertisements should not suggest that it is sensible or desirable to prefer a drink merely for its *high alcohol content* or intoxicating effect. To that end, high alcohol content should not be the principal basis of the appeal of any advertisement.
- 5.4.2. Advertisements should not suggest that *immoderate drinking*, however portrayed, is sensible, admirable or amusing. Particular care requires to be taken with advertisements for sales promotions which require multiple purchases.
- 5.5. Advertisements should avoid any implication, particularly when showing men and women together, that alcohol generally, or a particular drink, offers the key to success in *personal relationships* of any kind, or that it can make drinkers more attractive or successful in such relationships.

than non-drinkers, or those who drink something else.

- 5.6.1. Advertisements for drink should not suggest the *enhancement of mental ability or physical capacity*. In any advertisement which features sportsmen, particular care is required to avoid the implication being drawn that their performance, or success, is related to their alcohol consumption.
- 5.6.2. Advertisements should not suggest that drink has *therapeutic properties* or that it can resolve personal problems; in particular that it is acceptable to use it as a means of removing inhibitions, resolving tension or soothing agitation. Advertisements should not suggest that regular solitary drinking is advisable.
- 5.6.3. It is legitimate to base an advertisement upon the ability of an alcoholic drink to slake the drinker's thirst.
- 5.7. Advertisements should not depict *activities or locations* in connection with which the consumption of any drink whatever would be unsafe or unwise. Particular care requires to be taken with advertisements which depict powered vehicles of any kind and especially motor cars.

See also B.19.2 and 3 above in relation to breath-tests, 'safe' levels of alcohol consumption and low alcohol drinks.

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[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 87-Z-977

ADOLPH COORS COMPANY, PLAINTIFF

VS.

NICHOLAS BRADY, ET AL., DEFENDANTS

REPORTER'S TRANSCRIPT
(Trial to Court: Volume I)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 10:45 a.m., on the 26th day of October, 1992, in Courtroom C-502, United States Courthouse, Denver, Colorado.

APPEARANCES

BRADLEY, CAMPBELL, CARNEY & MADSEN, by K. PRESTON OADE, JR., 1717 Washington Avenue, Golden, Colorado, 80401, appearing for the plaintiff.

PATRICIA M. RUSSOTTO and ROBIN S. ROSENBAUM, Attorneys at Law, U.S. Department of Justice, Civil Division, 901 E Street, N.W., Room 912, Washington, D.C., 20530, appearing for the defendants.

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[6] MR. OADE: First of all, your Honor, I believe we have a stipulation that in 1976, Canada changed its law with respect to malt beverage labeling and advertising to require labeling.

Is that a correct statement of our stipulation, Ms. Russotto?

MS. RUSSOTTO: That's right, yes.

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[7] THE COURT: And what was the change? Does your stipulation go to what the change was?

MR. OADE: Yes. The change was simply that the law would require alcohol content disclosures on product labels and product ads.

MS. RUSSOTTO: It's my understanding that that's true for beverages that have more than 1.1 percent alcohol by volume.

MR. OADE: That's correct, your Honor.

THE COURT: 1.1 percent by volume.

MS. RUSSOTTO: By volume.

THE COURT: Now, my understanding is that if you're listing the alcohol by volume, it comes to a greater percentage than by weight.

MS. RUSSOTTO: That's also my understanding, your [8] Honor.

MR. OADE: That's correct, your Honor. I believe if you want to convert one to the other, you divide—if you're converting from volume to weight, you divide by .8.

Is that correct, Dr. Patino?

WITNESS PATINO: Approximately.

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[40] TERRY CATES, called as a witness by the defendant, having been first duly sworn, was examined and testified as follows:

THE COURT: Have a seat, please.

DIRECT EXAMINATION

BY MS. ROSENBAUM:

Q. Mr. Cates, how are you presently employed?

A. I'm presently employed as chief of the firearms and explosives division for the Bureau of Alcohol, Tobacco and Firearms, in Washington D.C..

Q. How long have you worked for the Bureau of Alcohol, Tobacco and Firearms?

A. Since January of 1971.

Q. Before the present position that you hold now, what position did you hold?

A. Chief of the industry compliance division for ATF in Washington.

Q. For what period of time did you hold that position?

A. From July of 1988 through—until September of this year.

* * * * *

[42] Q. Are you aware of whether Coors ever tried to use numerical statements of alcohol content?

A. Yes, they did.

Q. And do you remember when that was?

A. I believe it—it would have been in the 1984-1985 area.

Q. Would it refresh your memory to take a look at some of the exhibits that have already been entered or stipulated to in this case, AH and AI, the compliance documents that your office received?

A. Sure. All right.

Q. After having looked at Exhibit AH, do you recall when this action occurred against Coors for engaging in

placing numerical statements of alcohol content on its labels or in its advertisements, much like it wants to do as a result of this litigation?

A. Well, our actions culminated in a—what's called an "offer and compromise" in August of 1986.

Q. What were the terms of that offer and compromise?

A. I recall it being a monetary settlement between Coors and the Government of \$150,000, \$25,000 of which was agreed to by the parties to represent a payment for the violation of content disclosure. I think it was in the State of Iowa.

[43] Q. Can you briefly describe the type of alcohol content disclosure, numerical statements that Coors engaged in?

A. Well, they distributed cans of beverages in the State of Iowa which had content—numerical statements of content, alcohol content on them.

Q. Can you also describe the wallet cards that were brought to ATF's attention?

A. In June of 1986, we received a complaint from Anheuser-Busch companies with respect to Coors' allegedly having in the marketplace wallet-sized cards that had alcohol content disclosure of not only Coors but of competing brands.

Q. And the \$150,000 offer and compromise that you just mentioned: Did that also settle the wallet card incident?

A. Yes.

Q. Are you aware of—you mentioned earlier St. Ides had also engaged in putting forward numerical statements of alcohol content. Can you describe how they did this?

A. Well, St. Ides engaged in a practice of placing stickers on their labels that said, "No. 1 strongest malt

liquor." They also had an advertisement, I believe, that compared the St. Ides product to other malt liquor products or malt beverage products, I should say, where the St. Ides product come out as the strongest product.

Q. And that was through a numerical comparison?

A. Yes, it was.

[44] THE COURT: If I could interrupt, there really is—you're making a difference between malt liquor and malt beverage, are you not, malt beverage covering the whole span of beer, and malt liquor just being the specific—

THE WITNESS: Yes, ma'am. There is no legal category of malt liquor. It is all malt beverage. The industry has carved out a niche for itself that is commonly referred to as a malt liquor segment of the industry.

THE COURT: Okay. Thank you.

BY MS. ROSENBAUM:

Q. Now, these statements of numerical content that St. Ides used in its advertisements: Are those the same types of statements of numerical content that you understand Coors to be seeking the right to use as a result of this litigation?

A. Generally, yes.

Q. Did St. Ides ever engage in any other type of behavior other than using numerical statements of alcohol content in an effort to sell its products on the basis of the products' alcohol strength?

A. Oh, absolutely.

Q. Can you tell us about those instances?

A. They engaged in what we believe was extremely egregious advertising, using various rap groups and popular singers of the day to tout the strength of their product, using street jargon that would get consumers to buy their product based on [45] the alcohol strength.

Q. Did they ever—did they ever have any kind of enforcement taken against them?

A. Yes, they did.

Q. And can you describe for the Court what ATF did to respond to St. Ides' behavior?

A. Yeah. After a relatively lengthy investigation, we settled the matter by St. Ides' agreeing to cease and desist those kinds of activities in exchange for a payment of \$15,000, offer and compromise, and agreeing to shut down their business for a three-day period—of three days.

Q. Do you recall when these violations and subsequent remedies occurred?

A. Well, the violations occurred probably during the period of 1988 up through 1991, but the settlement occurred in 1991.

Q. And would that have been late 1991?

A. Toward the fall of 1991, I believe.

Q. Do you recall whether any other companies have ever tried to sell their products on the basis of alcohol strength?

A. Yes, a number of them.

Q. And were these companies also violating the FAA Act?

A. Well, we believed they were, yes.

Q. Have you heard of a company called "Olympia"?

A. Yes, I have.

Q. And do you recall whether they ever violated the FAA Act?

[46] A. Some years ago—I believe it was 1981, 1982, sometime like that—we believed they were violating the FAA Act and told them to stop. What they were doing is had billboards painted on the side of their trucks or attached to side of their trucks that said, "Powered by Oly"; and it showed starbursts and explosions and things of

that nature. And we believed that that was a violation of the strength prohibitions under the FAA.

Q. And ATF did take action with regard to this behavior?

A. We sought their compliance, and they agreed to stop doing that, yes.

* * * * *

[51] Q. I think before we left for lunch, Mr. Cates, you were about to tell us about the TV and radio ads for St. Ides. So if you could please tell us what it was about those ads that was problematic, that would be appreciated.

A. During the course of our investigation of the St. Ides issue, we ran across several radio and television commercials that we found touting the strength of their product and disparaging competitors' products. Some examples of the advertising—advertisements were that St. Ides would put hair on your chest, you could get your girl in the mood quicker, get your jimmy thicker, take a 40 ounce to the head and get a buzz [52] on, things of that nature. Those issues dealt specifically with the strength issue.

The disparagement issues were also part of that settlement, but they were—they were taking on their competitors' products and saying things like their beer tastes like battery acid and makes you throw up and have diarrhea and things of that nature.

Q. So it was this that the settlement, the offer and compromise, addressed?

A. The offer and compromise and the suspension, yes.

Q. Moving on to Heileman, do you recall whether any actions were ever taken with regard to Heileman products by ATF?

A. Well, several actions were taken with Heileman. Beginning—beginning, I suppose, as early as 1981 is the

first one that I was personally involved in, and that dealt with the phrase "dynamite," "dynamite taste." That was a popular phrase back in the early 80's. Everything was "dynamite"; and Heileman came in and asked if they could use that sort of phraseology in their advertising. And at first, we objected, saying that obviously in our opinion it connoted some sort of strength. But through some negotiations, again, which I was involved in, we decided to permit Heileman to use the phrase "dynamite" as long as it was juxtaposed to the word "taste" or somehow, you know, went to the word "taste." We weren't going to allow Heileman to advertise its product as being "dynamite," but we would [53] permit them to say something like "dynamite taste."

Q. Did Heileman stick to this agreement, or did they ever violate it?

A. No, they didn't stick to it.

Q. What did they do?

A. I don't—I don't remember exactly how long a time frame after our agreement, but they—they immediately went out with an advertisement that had lightning bolts and things like that and "dynamite" with explosions all around it and all that.

THE COURT: Could I just clarify? Did this relate to a malt liquor, rather than to a premium or other type beer?

THE WITNESS: Yes. It was Colt 45.

THE COURT: Colt 45. Thank you.

BY MS. ROSENBAUM:

Q. Was this action subsequently stopped by ATF?

A. Yes, it was.

Q. Did Heileman have any other violations? Did Heileman ever try to advertise again on the basis of alcohol strength after ATF took this action against the Heileman advertisement for Colt 45?

A. Well, Heileman has had a number of products which they attempted to advertise strength on, the Colt 45 being the first and the last one being PyroMaster [sic]. Obviously in between, there was the Mickey's Tower of power, I think was the one that they advertised.

[54] Q. "Mickey's" the name of the product?

A. Yes.

Q. And "Tower of Power" was the objectionable advertisement?

A. It was the reference to its strength, yes.

Q. Do you remember when this was?

A. The Mickey's Tower of Power, no, I don't; although I do remember that it was between — between the first episode and the last one.

Q. Would it refresh your memory to take a look at the memorandum that was signed by ATF on this?

A. Yes.

Q. Okay. That would be Exhibit AC.

A. Okay.

Q. After looking at Exhibit AC, do you recall when the action was taken against Heileman for Mickey's Tower of Power?

A. Our letter to them is dated November 21 of 1984.

Q. After these two episodes in 1981 and again in 1984 with two different products, I think you just had mentioned that there was a third episode with yet another product. Can you tell us about the PowerMaster episode?

A. Yes. The label "PowerMaster" was approved for Heileman Brewing Company. ATF approved that label in error. Upon a subsequent internal review, we found — we found the label, looked at it, and said to ourselves right away, "Wait a minute. This label is in violation of the law. It references strengths."

[55] So we took action to cancel that label. We can-

celed the label in July, I believe, of 1991.

Q. Do you recall —

THE COURT: Just tell me what the name was again.

THE WITNESS: PowerMaster.

THE COURT: Okay.

BY MS. ROSENBAUM:

Q. Do you recall whether the product PowerMaster — do you recall how you knew that it was being sold on the basis of strength?

A. Yes. We had obtained an internal memorandum, internal sales memorandum from the Heileman Brewing Company to its distributors that spoke to it being the new up-strength — up-strength malt liquor that would be able to compete with the other so-called "up-strength" malt liquors.

Q. And you just said that ATF took action against this in the summer of 1991; is that correct?

A. Yes. We canceled the label, and ultimately the product was withdrawn from the marketplace.

Q. Moving to a product calleed Old English 800, have you heard of this product before?

A. Yes, I have.

Q. And did Old English 800 — was that ever marketed on the basis of strength?

A. Yes, constantly.

* * * * *

[58] Q. Do you recall whether the Stroh Brewery Company ever sold any products on the basis of alcohol strength?

A. Yes.

Q. And could you tell us about those products?

A. The predominant product that employed the strength connotation was the Schlitz Red Bull.

Q. Was any action — what were the slogans that Schlitz Red Bull was sold on?

A. It seems that they also used the "It's the power," "It's the real power," somehow differentiating that from ordinary power.

Q. Would it help you to take a look at a letter that was sent out to Stroh's about this behavior and this campaign?

A. Yes.

Q. That is Exhibit AK.

A. Okay.

Q. Do you recall what the slogans were that Red Bull was being marketed on?

A. Well, in our letter to them of July 19, we say that they had—they ran a television commercial, wherein several times [59] throughout the commercial the words "power" and "strength" are used to describe the product.

Q. And what action did ATF ultimately take regarding the use of these slogans and these words connoting alcohol strength?

A. We asked them also to cease and desist this kind of advertising.

Q. Did Stroh agree to stop this advertising?

A. Yes, they did.

* * * * *

[60] Q. Are you aware of any other ways of receiving — of any ways of receiving alcohol content information for malt beverage products, any ways that the public might be able to receive alcohol content information on malt beverages?

A. Sure. A consumer can call us. We have the information on most malt beverage products.

Q. Would you give that information out to a consumer who called and asked?

A. Absolutely.

Additionally, generally what we do when a consumer calls is to—or when a consumer asks us to ask what the particular alcohol strengths of a particular product are, we refer them to the manufacturer.

Q. So you tell them to call the manufacturer?

A. Sure, yes.

* * * * *

Q. Can alcohol content information be published in the newspaper?

[61] A. Yes.

Q. Can it be given to the media?

A. Yes.

Q. Have you ever—has ATF ever published alcohol content information?

A. Not that I'm aware of. There is an ongoing study that I started approximately one year ago to determine the alcoholic strengths—the alcohol strengths of all malt beverage products in the United States and to cause that to be published when the study is complete.

Q. So it will be published?

A. Yes.

* * * * *

CROSS-EXAMINATION

BY MR. OADE:

Q. Good afternoon, Mr. Cates.

A. Good afternoon, sir.

Q. I want to talk about these enforcement actions that you've testified about here today. Would it be true that all these products you've been talking about like Mickey's, Silver Thunder, PowerMaster, Old English 800, St. Ides—those products are all what we call "malt liquors," aren't they?

A. That's correct.

[62] Q. And a malt liquor is labeled as such out there in the marketplace, isn't it?

A. Yes.

Q. Are you aware, Mr. Cates, that malt liquors only have a total of 3 percent of the malt beverage market in this country?

A. Yes, I'm aware of that.

Q. Okay. And it is true that the consumer is generally aware that malt liquors have more alcohol content than, let's call them, beers.

MRS. ROSENBAUM: Objection. Calls for speculation.

MR. OADE: If he knows.

THE COURT: If he has some knowledge or has done a study or is able to answer the question, he may do so.

THE WITNESS: I'm aware that the—that the alcohol content of malt liquors is generally known to be higher in those communities in which the malt liquor—malt liquors are directed to.

BY MR. OADE:

Q. Now, outside of this 3 percent of the market that we've been talking about the malt liquors, have you in your memory, aside with the matters with Coors that we're going to talk about in a minute—have you ever seen mainstream beer use these descriptive words like "strength," "dynamite," "rolling thunder," appealing to alcohol strength? Have you ever seen that?

A. Other than the one I've just testified about, the Miller [63] Brewing Company's Lowenbrau.

Q. The what product?

A. Lowenbrau by Miller Brewing Company.

Q. When did that occur?

A. Just recently.

Q. And what was that about?

A. It was the "strong character" advertisement for—that referred to—that was about Lowenbrau. We asked Miller Brewing Company to cease that.

Q. And Lowenbrau is called a super premium; is that correct?

A. Yes.

Q. It's toward the heavier end of the alcohol market or the malt beverage market?

A. No, not necessarily, sir.

Q. Okay. Well, what you're saying is—and I just want to see if I'm right, here—that all of the instances you've talked about with the—with the use of these descriptive terms that tout alcohol strength—they all deal with malt liquors except the Lowenbrau?

A. Except the Lowenbrau and the Coors matter, yes.

Q. All right. If the use of these descriptive statements to tout alcohol strength were commonly outside the malt liquor market, the 3 percent of the market dealing with malt liquors, you'd be aware of it, wouldn't you?

A. Yes.

[64] Q. Okay. Now, let's talk about the ATF's enforcement in this malt liquor category. Let's start with Stroh's product. What's the name of that product again?

A. The Red Bull.

Q. The Red Bull. Okay. They were using the slogan "It's the power"; correct?

A. "It's the power" and "the real power."

Q. And this happened when?

A. It happened before. It was an ongoing series of advertisements that ceased in 1991.

Q. And you took enforcement action in 1991, didn't you?

A. That's correct.

Q. And you took enforcement action, I believe, under 27 C.F.R. Section 7.54(c); is that correct?

A. That's the regulation, yes.

Q. Yes. And that regulation forbids brewers from referring to alcohol strength through the use of descriptive statements; correct?

A. That's correct.

Q. All right. And in 1991, there was an injunction in effect from this court, wasn't there?

A. To what effect, sir?

Q. Well, were you aware that this court had enjoined the ATF in 1989 from enforcing your regulations insofar as they prevented accurate disclosures of alcohol content to consumers?

[65] MS. ROSENBAUM: Object to the characterization.

THE COURT: Perhaps—and I don't know if I have it in front of me—perhaps you can be more explicit on what the actual order was.

MR. OADE: I can do that, your Honor.

BY MR. OADE:

Q. Mr. Cates, I will hand you a copy of this court's order dated May 31, 1989, and ask you to review it; and then I'll ask you if you were aware of it.

A. Okay.

Q. Have you had a chance to review this court's order dated May 31, 1989?

A. I have.

* * * * *

Q. Mr. Cates, the only point I'm trying to make here is that during 1990 and 1991, the ATF was taking enforcement action [66] against these brewers in the malt liquor segment of the industry using descriptive statements, and that was while this court's injunction was in effect; and this lawsuit had no effect whatsoever on your ability to enforce. Would you agree with that statement?

A. Yes.

MR. OADE: All right. Thank you. That's the only point I wanted to make, and I'll ask for the order back now.

THE COURT: All right.

BY MR. OADE:

Q. You are aware, then, Mr. Cates, that Coors in this lawsuit does not challenge the regulation at 27 C.F.R. 7.54(c) with respect to descriptive statements?

A. I understand what you're saying. I don't see the distinction; but I understand what you're saying, sir.

Q. Now, with respect to Stroh, "the real power," you sent some letters to Stroh objecting to the use of "the real power"; and they withdrew that phrase. Is that correct?

A. That's correct.

Q. Let's talk about Old English 800 for a minute. Old English 800 used the phrase, quote, "It's the power," or quote, "the power." Correct?

A. Yes, sir.

Q. And again, ATF wrote some letters objecting to the use of that phrase because it violated the regulation that [67] prohibits brewers from using descriptive labels to tout strength; correct?

A. That's correct.

Q. And as a result of your letters, Old English 800 stopped using the phrase "It's the power"; correct?

A. Yes, sir.

Q. Okay. Let's talk about St. Ides.

St. Ides was using a variety of marketing practices that touted the alcohol strength of their malt liquor; correct?

A. Yes.

Q. And I think that you indicated those marketing practices did include an example where they actually put the alcohol content on either an ad or a label; is that correct?

A. In an ad, yes, sir.

Q. And that alcohol—the statement of alcohol content in that ad was associated with the statement, quote, “No. 1 strongest malt,” unquote; is that correct?

A. That’s correct.

Q. So it wasn’t that St. Ides was just putting the alcohol content in an ad; it was putting the alcohol content in and then touting the strength; correct?

A. Both appeared in the same ad, yes, sir.

Q. Okay. And again, ATF wrote St. Ides a series of letters telling them that they were in violation of existing law, including the law that prohibits use of descriptive statements [68] to tout strength; correct?

A. That’s correct.

Q. And as a result of that, without having to resort to any judicial forum, you got an agreement with St. Ides for them to stop these practices; correct?

A. Ultimately, yes.

Q. Okay. Let’s talk about PowerMaster. PowerMaster is a Heileman product; correct?

A. Yes, it is.

Q. And PowerMaster was actually the name of the product; correct?

A. That’s correct.

Q. It was a malt liquor?

A. That’s correct.

Q. Okay. And Heileman is the same one that makes the Colt 45 malt liquor; correct?

A. That’s correct.

Q. So Heileman wanted to introduce a new malt liquor called PowerMaster, and they submitted the label to ATF for approval; is that correct?

A. Yes.

Q. Now, the reason Heileman submitted its label for

approval to the ATF is because they’re required to do that by law, aren’t they?

A. That’s correct.

[69] Q. In other words, if a brewer wants a label approved, the agency has to approve it, doesn’t it?

A. We have to approve the label, yes.

Q. And ATF approved “PowerMaster”?

A. That’s correct.

Q. And then ATF subsequently thought that “PowerMaster” was a reference to product strength; correct?

A. That’s correct.

Q. So after approving the label, you went to Heileman, you told them that you thought they were in violation of the regulation that prohibits the use of descriptive words to tout strength; correct?

A. Yes.

Q. Okay. And as a result of you writing these letters, Heileman withdrew this product from the market, didn’t they?

A. As a result of a meeting we had with them, yes.

Q. Okay. And they had—you let them use up their existing inventory, I understand?

A. Yes.

Q. But it’s off the market, isn’t it?

A. Yes.

Q. Now, Mr. Cates, do you believe that the ATF is able to effectively regulate against these types of abuses we’ve been talking about in the malt liquor segment of the market?

A. Yes, I do.

[70] Q. And you’ve shown that, haven’t you?

A. I believe we have.

Q. Okay. And that’s been going on, if you look at the dates of these enforcement actions, for the last two or

three years, isn't it, and before that?

A. Yes.

Q. Now, Mr. Cates, when you were — You were chief of the enforcement or compliance division; is that correct?

A. That's correct.

Q. Did that also include the wines and distilled spirits section of the department?

A. Yes, it did.

Q. Now, wines and distilled spirits are required to disclose alcohol content; is that correct?

A. That's correct.

MS. ROSENBAUM: Objection. Relevance.

THE COURT: The objection is overruled. He may answer.

THE WITNESS: That's correct.

BY MR. OADE:

Q. And you heard my opening statement, where I was asked a question by the Court as to how that was done; correct?

A. Yes.

Q. Distilled spirits are disclosed through proof; is that correct?

A. Yes.

[71] Q. And wines are disclosed through alcohol content by volume?

A. Yes, as are distilled spirits, too, by the way.

Q. Distilled spirits, it's my understanding within the last few years — distilled spirits are now required in addition to showing proof — they're required to show alcohol content by volume?

A. That's correct.

Q. Is that because the alcohol content by volume is deemed to be more meaningful information to consumers than proof?

A. Yes.

Q. Was that an ATF initiative, if you know?

A. I'm not sure.

Q. Okay. Now, there is also a regulation of the ATF that prohibits distillers and wineries from marketing their product based on strength; is that correct?

A. There is for wineries, yes.

Q. Okay. And has the ATF been able to enforce those regulations that prohibit wines from being marketed based on appeals to alcohol strength?

A. Yes.

Q. And have you been able to effectively enforce those regulations?

A. We believe so.

q. All right. Let's suppose a particular winery was very clever and they wanted to use the disclosure of percent alcohol [72] by volume in a manner to tout the alcohol strength of their product. Would you be able to detect that?

MS. ROSENBAUM: Objection. Calls for speculation.

THE COURT: The objection is overruled. He may answer.

THE WITNESS: Yes, sir. We have.

BY MR. OADE:

Q. Okay. In other words, you would look at the advertising as a whole, you would look at the way this information is being used as a whole, and make a judgment as to whether or not alcohol strength is what's being promoted here; correct?

A. That's correct.

Q. And you've been able to do that with wines and spirits?

A. With wines, yes.

Q. Okay. And in the malt liquor segment, you're able to do that — I mean you know when a brewer is marketing alcohol strength, don't you?

A. Yes.

Q. Okay. And you're capable, the ATF is capable, of determining when a brewer is promoting alcohol strength and feels capable of taking enforcement action against that, don't you?

A. Yes, we do.

* * * * *

[75] Q. Okay. I just have a few more questions, Mr. Cates.

How long did you say you've been at ATF?

A. I've been employed by ATF since January, 1971.

Q. And how many years of that has been spent in alcohol enforcement under the Federal Alcohol Administration Act?

A. With the exception of about two and a half years, the majority of my work has been involved in alcohol enforcement.

Q. How many years experience do you think you have in alcohol [76] enforcement?

A. I came to Washington in 1981 and specialized in alcohol enforcement under the FAA Act from 1981 till now, with the exception of two years, two and a half years.

Q. So it's been about eight, nine years of enforcement?

A. Under the FAA Act, of specialized enforcement, yes.

* * * * *

[83] DIRECT EXAMINATION

BY MR. OADE:

Q. Dr. Patino, what is your current position with the Coors Brewing Company?

A. I'm the director for brewery research and development department.

Q. Does research and development—could you just give us a brief summary of what that means when you say "research and development"?

A. Yes. We do research starting from our raw ingredients, such as barley, hops, all the way through the process including the malting, the brewing, the fermenting, aging, filtration processes; and then we go further into the new product development in cooperation with the marketing research department, and finally the sensory or flavor research.

* * * * *

[84] Q. And is Exhibit 6 a summary of your education, your work experience, and your publications?

A. That's correct.

Q. Okay. It says you have a doctorate in chemical engineering; is that correct?

A. That's correct.

Q. Would it be fair to characterize your current field as brewing chemistry?

A. Brewing chemistry in its broadest sense, yes. That would be accurate.

Q. Now, as a brewing chemist, Dr. Patino, do you attend professional seminars and conventions and that type of thing?

A. Absolutely. It's part of—part of my job description. I'm [85] responsible to be up to date on any technology developments and what have you, so I have to be up to date. And in addition to that, from the record, you will see that we're—I've been active in the actual presenting and publishing of papers in the brewing field.

Q. Okay. Now, I want to talk for a moment about the type of research that you do at Coors on taste and sensory

characteristics of the product. Could you describe generally what type of research you do into product attributes like taste?

A. Yes. We at Coors have a number of flavor panels that each one looks at a different aspect of the sensory—of our products, the sensory attributes of our products.

For instance, we have one expert panel that does nothing but try to distinguish differences between two products. We have another one that dedicates itself to establishing in what way are these beers different by analyzing different flavor intensities.

There is another panel that does nothing but to look at the acceptability of the product, no matter for what reason, simply the acceptability of it. And then the ultimate is taking it to consumers.

So there is again jointly, with marketing research—we have assessment forms, questionnaires that are given to consumers when samples or products are provided to evaluate their acceptance.

[86] Q. Now, does this taste testing in these panels—are they maintained on an ongoing basis?

A. Oh, yes. On a daily basis, they all meet. The exception obviously is a consumer panels. Those take place on an as-needed basis.

Q. Does this research include the types of product characteristics that appeal to consumers and is the reason why they might buy a particular product?

A. Absolutely. We ask them overall, "How do you like it?" That's what we call the "hedonic scale." But in addition to that, we have a relatively long list of attributes where we try to pin them down as to why they like it or didn't like it, such as bitter, harsh, sweet, astringent, malty, and so on.

Q. Okay. Does your testing include blind testing?

A. Yes. In all of them and all of the panels I described—and to a great extent, they are blind test taste tests, because the panelists are not told what the test is about. And the internal panelists programs, in some of them we tell them what beer type it is; but in consumer testing, you typically don't tell them anything. All they know is that one product has—is No. 231 and the next one is 456. There is a questionnaire that is presented previous to that; but other than that, they are not told what they are testing.

Q. Would you describe the things that affect the taste of a given malt beverage? What affects product taste?

[87] A. You mean the factors that contribute to different tastes? Gee.

Q. Yes, just in summary.

A. In a very abbreviated explanation, what you have is an overall balance that you need to achieve; and that balance comes from several key elements. One of them is a sweetness which comes from the residual sugar that was left unfermented. One is from the level of alcohol, and one is from the bitterness or the hops—the amount of hops that are used.

If any of the three are taken by themselves, they would create an imbalance in the product resulting in a lower acceptability of it.

Q. Let's suppose, Dr. Patino, that a brewer was selling a beer at an alcohol content of 3.5 percent alcohol.

A. Okay.

Q. And let's suppose the brewer wanted to raise the alcohol content of that product, for whatever reason, from 3.5 percent to 3.7 percent or 4 percent. Would a brewer be able to do that from the standpoint of the brewing process?

A. Technically, yes, we would be able to do it without any trouble.

Q. Would a brewer be able to do that without adversely affecting the product itself?

A. No.

Q. Would you explain why not?

A. We ran a study earlier this year where the level of alcohol [88] in a Coors product was raised from 3.5 to 3.7, a very marginal increase. And what was seen was that one attribute that we were investigating, which is called "smoothness," was not impacted, as some people believed it would. It didn't make the product smoother. What was very disturbing at the same time was the fact that it became what the sensory experts would call a very polarizing attribute, and what that meant was the following: that about one-third of those consumers said, "I like the product better," about one-third said, "I like it now less," and about one-third were ambivalent.

If you were to change an established brand, it would be extremely dangerous for you to do so under these circumstances; and the reason why is that obviously you're alienating about one-third of your consumers.

So yes, if you say what would you like to have seen if the overall goal was no flavor change is that you wouldn't have had this polarity develop; that either everybody liked it or everybody disliked it or everybody was ambivalent.

Q. It is technically possible to raise the alcohol content of any malt beverage without changing flavor or other product characteristics at the same time?

A. Unless you're talking extremely small amounts, the answer would be no. You would change the taste as you change the alcohol level.

Q. And when you say, "very small amounts," what are you [89] talking about? What is a very small amount?

A. 0.1 percent, perhaps .05. That's within the process capability, as we call it, just how accurate can your ana-

lytical instruments and your process controls get.

Q. I want to talk about alcohol itself for a minute as a product of beer or malt beverages. How is alcohol itself perceived or—"perceived" is a bad word. What are the flavor and taste characteristics of alcohol? Can you explain that?

A. When we taste food, we use several senses; and of course one is the aroma; so by smell, we detect differences. By our tongue, by our taste, we also tell differences.

There is a third attribute called sensation, which is neither of the two, the first two. And what that talks about is just sensations, tingling, numbness, those sorts of things.

In the case of alcohol, that is perhaps the one—the one characteristic that affects all three. Several chemical compounds that you will find in beer will affect only either the aroma or the flavor or the sensation but not necessarily all of the three.

So alcohol, again, becomes a vital part of defining what the product characteristics are.

Q. What would happen to a particular product if a brewer wanted to raise the alcohol content from, say, 3.5 percent to 4 percent—How would that affect the product itself—and left everything else the same?

[90] A. Leave everything else the same, but increase the alcohol?

Q. Yes. How would that affect the product?

A. Again, it would create an imbalance. The exact words the consumers may use will be different and the actual describing of these terms is still something that different areas of the country do it a little bit different; so I would be—it would be difficult for me to give you a precise answer on it would make it more like this or more like that. I would feel that that would be generalizing a lit-

tle bit too much. Let's just say it would change it. It would create perhaps a greater sensation of some of its attributes and a lessening of others.

Q. Would it affect the product balance?

A. Oh, absolutely, yeah.

Q. Would the effect produced on the product balance in your opinion be favorable, or unfavorable?

A. It would be unfavorable in the sense that it would change the product to what it used to be.

Q. From what it used to be?

A. From what it used to be.

Q. Let's talk for a minute about why consumers drink beer. Do you know the primary reason why consumers drink beer, based on your research? What's the primary product characteristic that consumers like about a beer?

A. They want refreshment, they want an alcohol that is in moderation, so it's a beverage of moderation, if you will. [91] They don't necessarily like the sweetness of pop, and they were not wanting something real heavy, like a wine or a high alcohol drink.

Q. How about taste? What role does the product characteristic of taste have?

A. Well, again, there is the refreshment, the thirst-quenching aspects that have to be part of that product.

Q. Now, you indicated that consumers want moderation with respect to alcohol level. Did you say that?

A. Yeah.

Q. And on what basis do you make that statement?

A. Well, basically, if you look at the trends that the industry is going through, we have been increasing and increasing the lighter beer consumption in the country. In the case of Coors, we're already—almost two-thirds of it is light beer. And again, the industry has a whole—I guess other witnesses can cover it better, but it's been in-

creasing dramatically. The no-alcohol market has been increasing tremendously in the last year.

If you say have the higher alcohol level products been increasing, or is there a great deal of technological effort on creating better high alcohol products worldwide, no. Everybody is struggling to create the very best either no-alcohol or low-alcohol products. And we get to hear that from the technical discussions at our conventions and symposiums.

[92] Q. When is the—

THE COURT: I may have heard him wrong.

Did you say that light beers is two-thirds of the beer that Coors produces?

THE WITNESS: Approximately 60 percent or so, yes.

THE COURT: Go ahead.

BY MR. OADE:

Q. You mentioned a symposium or convention. When is the last time you went to such a symposium or convention?

A. Last September. It was the brewing Congress of the Americas, which is the collection of both technical societies that—well, that oversee our industry, both the Master Brewers Association, as well as the American Society of Brewing Chemists.

Q. There were brewing chemists from all over the world at that convention?

A. That's correct.

Q. And you presented a paper; is that correct?

A. That's correct.

Q. And you exchange views with your colleagues at these conventions?

A. That's correct.

Q. Are you familiar with—you said the trend worldwide is to try and produce a nonalcohol or low-alcohol beer. Is that correct?

[93] A. Yes.

Q. Why is that?

A. Well, let me, if I can pick on one example—I have conversations from two technical directors from Australia just as part of this ongoing exchange of ideas. In any event, one of them—well, both of them told me that the biggest growth for their industry right now was in the low-alcohol beer market, and that was anywhere between 1 to 2½ or so percent alcohol by weight. In those countries, the level of alcohol is on the label, and that's the category that apparently is growing the fastest and that they're the most excited about. So that's just one example.

Q. You're saying that in Australia, the alcohol content of the product is shown on the label?

A. That's correct.

Q. What is the relationship between the alcohol content of a malt beverage and the amount of calories in that malt beverage attributed to alcohol? And I'll refer you in that regard to Exhibits 5—4 and 5 and I'll ask you to comment upon those exhibits and answer my questions with respect to those exhibits.

A. Yes. Thank you.

What these two graphs show is essentially the result of an experiment where we took alcohol and we added alcohol to pure water. After additions of these 5 different levels, we ran those samples through the laboratory to determine the [94] amount of alcohol that was in those solutions as well as the amount of calories. And as you can see, as you increase alcohol, you increase calories. And there is a one-to-one linear relationship, taking you from, say, about 20 calories for a 1 percent to 110 or so for a 4½ percent by weight.

Q. Is calories something that consumers are looking for in a malt beverage, or something they generally want to avoid?

A. It's something that they would like to avoid based on the current trends; and again, that is substantiated by the growth of that particular segment of the industry.

Q. If you could produce a product hypothetically, a malt beverage that would taste exactly like, say, a Coors Extra Gold, the same taste, the same sensation, the same body, the same color, and had zero alcohol in it, would it be a successful product?

A. I don't know if it would be a successful product. All I know is that that would be impossible to achieve, because alcohol—as soon as you introduce alcohol into the product, it will give you calories.

Q. Let's suppose you could achieve it. Would it sell?

A. Oh, yeah. I'm pretty sure it would.

Q. Are you familiar with the malt liquor segment of the industry?

A. Some.

Q. Do you know based on your research if malt liquor drinkers [95] have different taste preferences than drinkers of light, regular, premium beers?

A. Yes. As part of these ongoing consumer panels—is just fascinating. An if you present an array of products to those consumers and you pre-screen them to know if they are predominantly either light beer drinkers vs., say, malt liquor or super premium type drinkers and you ask them to rate acceptability and many or attributes of those products, that's something that we've done and has been a fairly long array of products. What you end up finding is that the consumers that like the lighter beers like the lighter beers as a whole. In other words, all of the light beers were rated high, some higher than others, but higher as a group by a long shot compared to how they rated all of these other heavier type beers.

If you ask how did the other group of consumers do

with the same test, the same samples, it was exactly the opposite. So consumers of malt liquors, super premiums, and so on, would take—would tend to look for attributes that are fairly different from what a light beer consumer would.

Q. Does in your opinion—do the malt liquors have a distinctly different taste than other mainstream products, malt beverages?

A. Yes.

Q. How would you describe the taste of, for example, Old English 800, which is the leading up-strength malt liquor?

[96] A. Instead of picking a specific example, I would like to say as a category, they tend to be more bitter, more sweet, fuller bodies, thicker in general. In other words, more of just about everything. All of these flavor intensities would tend to be higher overall again compared to the light beer.

Q. And is that because you can't just increase alcohol strength without affecting these other taste characteristics?

A. That's correct. Essentially—if you say essentially how do you design a new product, you have to strike that balance of sweetness, bitterness, and alcohol level.

Take, for instance, a light beer. A light beer will have in an analytical scale of bitterness—will have a value of about 11 or so. Malt liquor will have some bitterness intensity in the 20's; in other words, almost double, but they won't taste—the higher alcohol products won't taste terribly bitter because along with the increase in bitterness came an increase in sweetness from unfermented sugar, as well as an increase in alcohol.

Q. We had a witness in this case, a Mr. Hugh Nelson of Heileman, who described the taste of Old English 800

as quote, "nasty," unquote. Have you ever tasted that product?

A. I have tasted that product.

Q. What do you think it tastes like?

A. I wouldn't buy it personally; but again, it is an issue of balance. It's just—it doesn't have the balance that I would [97] like as a consumer to see.

Q. Are you familiar with the Coors product Extra Gold?

A. Yes.

Q. What are the product characteristics of Extra Gold that appeals to consumers, if you know?

A. It would be along the areas of fuller body, a darker color, fuller flavor. Relative to what? Relative to regular Coors.

Q. Could Coors or any other brewers, if they wanted to, respond to a perceived consumer demand for more alcohol content in a beer, assuming there were such a demand, just by raising the alcohol content of existing products? Would a brewer do that?

A. Oh, yes. We all use these days what is called "high gravity brewing"; and as a result of that process, the alcohol level in your completed or finished brew is higher than your final beer; and so you can adjust it easily that way.

Q. Please listen to my question.

A. Okay.

Q. You have a range of existing products like Coors Light, Coors Extra Gold, or Bud Light, or whatever.

A. Okay.

Q. Let's suppose Budweiser or Coors wanted to raise the alcohol content of its product to respond to some perceived consumer demand here for higher alcohol like the Government says. Would a brewer do that? Would it make sense?

[98] A. No, it wouldn't, again based on the studies that would show that even a modest increase in alcohol level would change the product characteristics. And so if you're already either taking the product off balance or you are alienating a segment of your consumers by changing the flavor of the product, or if you try to manipulate now and restore balance by adding more sweetness and therefore more calories to the product, you essentially have totally changed the profile that you started with. And therefore, you no longer have that product that the consumer used to buy.

Q. Now, you indicated previously that you were familiar with brewing practices in other countries. Is that correct?

A. That's correct.

Q. Are you familiar with the labeling laws in, say, Canada and Australia and the United Kingdom?

A. I don't know about the laws. All I know is that I have seen samples repeatedly, and the labels include the alcohol percent in those instances.

Q. When you're saying samples, what do you mean?

A. Samples. Finished product, of the beers coming in.

Q. So you've seen product labels for Canada?

A. Oh, yes. Again, we are an international brewery or brewer, and our product is brewed in Canada, in Japan, in the UK; and just as a result of our quality assurance measures, if you will, we have to not only look at them from a chemistry standpoint, [99] we also look at them from a flavor standpoint. But we receive packages, ordinary packages at random; and they do contain the labels showing percent alcohol.

Q. Are you aware of any efforts in those countries that we've mentioned that have disclosure laws, efforts by brewers to simply raise the alcohol content of their prod-

duct or any evidence of a so-called "alcohol strength marketing wars" in any of the countries that we've been talking about?

A. No. In none of them at all. In fact, again, the trend is in the opposite way.

Q. And on what do you base your statement that you haven't seen any evidence of this? How do you know that that's not happening in, say, Canada, or Australia, or the United Kingdom?

A. Again, as part of my job to be up to date on what's happening, I review the trade journals, I talk to the technical directors of other breweries. We exchange views on technologies that are emerging. And they are all concentrating on how we can make a better lower alcohol product or a no-alcohol product. My counterpart from one of the breweries from Australia was extremely excited about the low alcohol beer simply because of its implications in the alcohol levels in blood and how much could consumers couple before being impaired and that sort of a thing. So, you know, all of these things through these various means.

Q. Dr. Patino, in your opinion, if, in this country, the [100] percentage alcohol content of the product was shown on product labels or were simply stated as a factual matter in product ads, would that in your opinion cause brewers to raise the alcohol content of their product or engage in any type of alcohol strength war?

A. No, I don't believe it would.

* * * * *

[102] Q. Do you have an opinion, Dr. Patino, based on your experiences, whether the alcohol disclosure laws in these other countries we've talked about have resulted in any alcohol beer wars or the product being sold based on strength?

MS. RUSSOTTO: Your Honor, we object to that question. [103] Mr. Patino has indicated that he's not aware of the actual laws of other countries. We don't believe that he has any particular knowledge or expertise regarding foreign law. He can testify regarding what the practices of the brewers in foreign countries are, not regarding what the legal requirements are.

MR. OADE: I'm not asking him what the law is, your Honor. I'm asking him what brewers are doing in those countries that we all know have labeling. It's already in evidence which countries have labeling.

THE COURT: Well, I'm not sure that that's even really an opinion question. You're asking him what he knows of what brewers are doing in other countries, what he has observed or learned at the conferences? He may answer that.

BY MR. OADE:

Q. Go ahead, Dr. Patino.

A. Thank you.

Just to perhaps help illustrate where in addition to just technical verbal exchange—where I get information, as a clear example would be trade journals. Specifically there is one called, "Brau Welt International." It's a regular publication that comes from Germany and is in English; and it reviews on a regular basis the trends—not trends per se, but it just talks about news in the brewing world. And it goes country by country. And that very document, I reviewed last [104] week; so it's something again that have I to do as part of my job.

In any event, from all of these sources, I just don't see any evidence that would indicate that in any of these countries there is any swing or move toward a higher alcohol content in any of these malt beverages.

Q. As a result of product labeling?

A. Yeah, exactly.

MR. OADE: If I may have a moment, your Honor.

THE COURT: Go ahead.

MR. OADE: That's all the questions we have, your Honor.

EXAMINATION

BY THE COURT:

Q. Could I clarify one thing? I thought I heard you testify that Coors brews in Canada, England, and Japan?

A. Under license, your Honor, like the Molson Breweries of Canada brew Coors and Coors Light under license. It's our label, our process, our yeast.

Q. Does the label, when they brew it, have the alcohol content on it?

A. That's correct, ma'am, yes.

Q. So it says, "Coors." It's just for Canada and it has the alcohol content on it?

A. That's correct, yes. Similarly for Japan, by the way, [105] other countries.

Q. Let me ask you one more question before cross. There always used to be conversation about 3.2 beer and 6 percent beer and the fact that you could get 3.2 beer in the supermarkets but not the 6 percent beer. Can you explain to me anything that would help me understand those common ways of thinking? Maybe that is not the way it is anymore; but I remember hearing people say, "Well, I'll be able to get beer at Safeway, but it's only 3.2 beer."

A. That's correct. In a few states—Mr. Rechholtz would be better at this in specifics; but in some states, specifically Colorado, one of them, the final product that is sold in something like a supermarket would be adjusted to be no more than 3.2 percent by weight.

So if you say what is that 3.2 Coors in a supermarket,

it's a Coors product that has its alcohol adjusted to 3.2 percent by weight.

The Coors product you would get at the liquor store would have been, then, Coors product adjusted to an alcohol level of 3.55 percent by weight.

If you say, "Well, give me another example," that would be Extra Gold. If you say it's an Extra Gold with—an Extra Gold 3.2 would be again Extra Gold adjusted to 3.2 percent alcohol by weight, whereas its counterpart from the liquor store would be Extra Gold but with a final alcohol of [106] approximately 3.9 percent; so it doesn't tell you what the others are; it only tells you that the one that has been labeled as 3.2 has that alcohol level as its limit. And it can be sold, then, in some of these other retail accounts where they don't have a license to sell the the other higher alcohol levels.

Q. From what you just told me, the taste differs depending on the alcohol content?

A. That's correct. That's a good point.

Q. Can you tell me if the 3.2 beer in Safeway tastes different than the 3.5 in the liquor store?

A. Yes, it's going to take slightly different. It's going to be a little blander, not as strong or as well balanced. It is my opinion it is not a well balanced product.

Q. Which one is not well balanced?

A. The 3.2 as compared to the 3.5. Why? Because it was formulated to be 3.5 as it's sold in the, very great majority of the country. So it's a problem that in those very few states we still have to deal with.

* * * * *

[107] THE COURT: Thank you.

(The Court was in recess from 3:25 till 3:45 p.m., and when reconvened, the following proceedings were had and entered of record:)

MR. OADE: Your Honor, during the break, I have had a chance to get out my file on the regulations; and if now is an appropriate time, I'll be glad to clarify the regulations we're challenging.

THE COURT: Okay. I just want to be clear which one you were distinguishing from 7.54(c).

MR. OADE: Okay. If you'll look at 7.54(c), we do not challenge the first statement that occurs there. It reads, "Advertisements shall not contain the word strong, full strength, extra strength, high test, high proof, full alcohol strength." That is unchallenged in this case by Coors, your Honor.

But we do challenge starting with the statement, "or any other statement of alcohol content or any statement of the percentage and quantity of the original extract or any numerals, letters, or characters, or figures—" We do challenge that. And what we are saying is you can prohibit words or statements that are descriptive, but you cannot prohibit pure factual disclosures.

THE COURT: Okay. So there isn't another section that you're referring to.

[108] MR. OADE: There is another section that deals with advertising that we're challenging, and that is 7.29(g). 7.54(c), and then 7.29(g) has a similar provision, "Use of numerals: Labels shall not contain any statements, design, or devices whatever, whether in the form of numerals, letters, characters, figures, or otherwise which are likely to be considered statements of alcohol content."

So we challenge 7.29(g).

THE COURT: All right. Thank you.

MR. OADE: I do have, your Honor, one further area of testimony for Mr. Patino before I sit down; and it will be very brief.

THE COURT: Dr. Patino, do you want to take the

stand again, please. Understand you're still under oath.

THE WITNESS: Yes, ma'am.

THE COURT: And you have a couple more questions before cross-examination, you said.

DIRECT EXAMINATION (continued)

BY MR. OADE:

Q. Dr. Patino, you are familiar with the brewing process; is that correct?

A. That's correct.

Q. Are there any differences between the brewing processes used in 1935 and the brewing processes used for malt beverages today?

[109] A. There sure are. They're basically in several ways: the raw ingredients that were used at the time, as well as the equipment, the analytical capabilities of laboratories; in other words, specifically, for instance, the precision with which you could measure alcohol levels. It wasn't just nearly as precise as it is today.

Q. How about variations in temperatures in the malt cellar, which Congress was concerned about in 1935. Are there variations in temperature in the malt cellar today?

A. Well, again, although there are still variations, you have computerized controls, much better, more sensitive equipment to produce a real uniform product. See, the key for a brewer is to produce a product that is as uniform as it can be so that the consumer won't see a change from one glass or one package to the other.

And that uniformity comes from understanding better the process but also from the equipment, the instrumentation that is now available.

Q. Dr. Patino, according to the legislative history of the 1935 Federal Alcohol Administration Act, there was a concern that disclosing alcohol content on the label

might be misleading to consumers because there were variations in the alcohol—alcohol product levels depending on how you brewed it today vs. yesterday and depending on the particular brew that it came from. Is that a concern with today's brewing processes?

[110] A. Oh, absolutely not. For one thing, back in those days, they didn't use what we have now, which is higher gravity brew; and now we can adjust those variations later in the process, whereas once they had put in their materials and they had their finished product at the end of aging, that was it. They couldn't really affect the levels nearly as much as we can today.

Similarly, the homogeneity of the barleys they were receiving and therefore the malts that they were receiving was much wider in characteristics than what brewers can do now because of the better understanding but also just the sheer volume. You can mix and blend as you go.

Q. You were also asked some questions by the Court about the alcohol levels of a 3.2 beer sold in a grocery store as opposed to alcohol levels of a 3.2 beer sold in a grocery store as opposed to alcohol levels of a beer sold, say, in a liquor store; and you identified the differences. I'd like to ask you with respect to light beers. Let's take a Coors Light: Is there any difference in alcohol content of a Coors Light between a Coors Light sold in a grocery store at 3.2 percent by weight and a regular Coors Light sold anywhere else?

A. Yes. It's practically insignificant. It's in regular liquor stores—is in the order of 3.25, 3.3 at the most, vs. 3.2. So now you're getting into an area where, yeah, it would be extremely difficult to tell that alcohol difference.

MR. OADE: That's all I have. Thank you.

[111] THE COURT: Cross-examination, please, Ms. Russotto.

CROSS-EXAMINATION

BY MS. RUSSOTTO:

Q. Good afternoon, Dr. Patino. How are you?

A. Fine, thanks, Pat.

Q. All right. I'd like to follow up on some areas here. Before the break, you were asked about changes in the alcohol content of products that are sold in a grocery store vs. sold in a liquor store. There are differences. That's correct?

A. That's correct.

Q. All right. And so Coors, then, is already selling a single product—for example, let's take Coors—the Coors beer itself. The Coors beer itself might have a different alcohol content depending on if it's sold in a grocery store or sold in a liquor store. Is that correct?

A. In those few states where it's required, yes.

Q. Now, in the states where it is required, the Coors beer that's sold in the grocery store, then—I take it that Coors actually does have some success in selling Coors beers in grocery stores; correct?

A. Actually, we've been disputing just how many-fold those sales are. They're so small that it's really a—just the presence. If you say—and again, Mr. Rechholtz would be better at answering this, but if you say what percentage of the product that we produce is 3.2, my gosh, it's extremely, [112] extremely small; so it's not because it's successful but because you don't want to lose on that market segment or that opportunity.

* * * * *

THE WITNESS: In the case of the Coors Banquet Beer, the level will be 3.55 for regular Coors Banquet in the liquor [113] store, 3.2 in the supermarket.

BY MRS. RUSSOTTO:

Q. Now, do you simply reduce the alcohol content of

the beer by blending it down to get to 3.2, or do you try and compensate for it by changing other characteristics? How do you get from the 3.55 to the 3.2 beer that's sold under the same label?

A. Yes. Because of the very limited volume and therefore the minimal impact that it would have on the company, at this time it is produced by blending down the previously formulated product to have a finish alcohol of 3.55 by blending it down further with additional water to 3.2.

If you ask if we—if we saw this as a successful, important segment, would then we brew or change our brewing formulation so that the 3.2 product would be more acceptable or have a better balance, I would say yes, we would have to brew differently, so that now that we have moved the alcohol level to a different point, we ought to adjust some other characteristics. To do so, however, is expensive, it is cumbersome; and that's a business decision, basically.

Q. So at this point, then, you do not adjust the other characteristics of the 3.55 beer to get it down to the—when you blend it down to 3.2?

A. That's correct.

Q. Now, I believe you stated earlier in your testimony that increasing the alcohol content of a beer would also increase [114] the caloric content of the beer. Is that correct?

A. Oh, yes, absolutely.

Q. And that's because the alcohol, the additional alcohol, adds some calories; correct?

A. Correct. To give you an idea, in the case of light beers, the percent of the final calories that come from alcohol is on the order of 75 or so percent, and the remaining comes from the unfermented sugars.

In the case of heavier type beers, that percentage is reduced to about 60 percent.

Q. 60 percent that comes from the ethanol?

A. That's correct.

Q. And so there is more of the caloric content that's going to come from residual sugars?

A. That's correct. And the reason for that is, once more, that if you increase one, you automatically ought to increase the other, which in this case as is residual sugar, so that you try to maintain a certain product balance. That's why then even though you have more alcohol, less of the calories come from alcohol, because you have to leave more sugar in that product, so that again, you tend to establish that balance.

Q. Now, I believe you also said that increased caloric content would be a negative product attribute for most consumers. Is that your understanding?

A. For an important segment of consumers, I would say so, yes.

* * * * *

[117] Q. I believe you also said that earlier this year, Coors had conducted some research whereby you increased the alcohol content of one of the Coors products from I think it was 3.5 alcohol by weight to 3.7 alcohol by weight. Is that correct?

A. I believe so.

Q. Which Coors product was that?

A. That was Coors Banquet.

[118] Q. Coors Banquet Beer?

A. Yes.

Q. And I believe that you also stated that you found that one-third of the consumers actually liked the product better with 3.7 percent of alcohol; is that correct?

A. That's correct.

Q. And only one-third of them actually actively disliked the product with higher alcohol; correct?

A. Correct.

Q. Now, I wanted to ask you a few questions about product development. Again, the—Coors might, might it not, introduce a product to appeal to those one-third of consumers that liked the higher alcohol product better. Coors might do that. Correct?

A. It's conceivable, depending on a variety of factors: its potential for growth, its cannibalization, all sorts of other issues that rely more on marketing think the technical folks like me.

Q. But Coors might try to capitalize on the fact that you found that one-third of the consumers like the higher alcohol products better.

MR. OADE: I object, your Honor. She was at pains to [119] note that this witness is not a marketing person.

MS. RUSSOTTO: I'm asking whether Coors might develop a product. I believe if he's allowed to go further, he will testify that his office does develop products.

THE COURT: The objection is overruled.

BY MS. RUSSOTTO:

Q. It is conceivable that Coors might develop a product in order to capital lies on this one-third of consumers that liked the higher alcohol product more. Correct?

A. That's correct. And what you want to do in that case is understand why, what were the product attributes. And there are several ways of looking at the—at this proposition that may or may not end up having a final product that will have a 3.7.

Q. Okay. I understand that. I just wanted to know whether that—thank you. You've answered my question. That's fine.

* * * * *

[138] Q. Now, you testified that you cannot raise the alcohol content without affecting the product character-

istics like taste that make the product successful. Is that correct?

A. That's correct. Yes.

Q. All right. Are there any technological innovations on the horizon in the foreseeable future that are going to affect that fact that you can't raise alcohol content without adversely affecting product taste?

A. I don't believe that there are, in the sense that again, it's like asking for a beer that has no calories but has a high alcohol content. There is some basic laws of physics that you cannot change. Again, once you raise alcohol, you're going to have to think of what else you need to do with the sugar and the bitterness to achieve the new balance. So now you have a new balanced product and you say it is well liked? Well, it appears to be well liked. That's great; but now does it conform to the product that we started with? No, it's totally different.

So the answer is no, I don't see anything that will substantially change in technology in the years to come that would enable us to indiscriminately raise the alcohol level without altering its final product characteristics.

MR. OADE: Thank you, Dr. Patino. That's all I have.

THE COURT: Any questions based on this last group of questions?

* * * * *

[139] ROBERT RECCHOLTZ *[sic]*, called as a witness by the plaintiff, having been first duly sworn, was examined and testified as follows:

THE COURT: Please have a seat.

[140] DIRECT EXAMINATION

BY MR. OADE:

Q. Mr. Rechholtz, will you state your current posi-

tion with Coors Brewing Company?

A. I'm executive vice president, marketing, domestic and international.

Q. Is there any higher official in the company with respect to marketing and product sales?

A. No.

Q. Do you sit on the board of directors of Coors Brewing Company?

A. Yes.

Q. What is the difference between Adolph Coors Company and Coors Brewing Company?

A. The Coors Brewing Company is devoted solely to the production and the marketing of malt beverages. The Adolph Coors Company, which is the holding company, is also associated with other endeavors, such as ceramics and biotechnology, packaging, etc.

Q. Is Coors brewing a wholly owned subsidiary of the Adolph Coors Company?

A. Yes.

Q. How long have you been at Coors, Mr. Rechholtz?

A. Approximately 11 years.

Q. And how long have you been in a marketing capacity career- [141] wise?

A. Hate to say. 34 years.

Q. And are all of those 34 years in executive marketing positions?

A. Well, I started out as a grunt with Procter & Gamble and worked my way up.

Q. All right. And what companies have you worked for besides Coors and Procter & Gamble?

A. I worked for R.J. Reynolds Tobacco, for Liggett Group, for Gallo, Joseph Schlitz Brewing Company, and Coors.

MR. OADE: Your Honor, we would tender Mr.

Rechholtz to the Court as an expert in marketing in general and with respect to the brewing industry in particular.

MS. RUSSOTTO: Your Honor, we don't have any objection to Mr. Rechholtz being termed an expert in marketing, as long as that expertise is limited to the United States; and I believe that we're going to get in to some other aspects later on, and we will be asking for an opportunity to voir dire Mr. Rechholtz based on his knowledge of marketing and beer markets beyond the United States. But as to the United States, we have no objection.

THE COURT: I will accept him as an expert witness, then, in the marketing area in the brewing industry in particular. If you're going to get into international, you're going to have to lay further foundation to see if he is or is [142] not an expert.

MR. OADE: I'll do that right now, your Honor.

BY MR. OADE:

Q. Mr. Rechholtz, does Coors sell its products in Canada?

A. Yes.

Q. And how long has Coors sold product in Canada?

A. Approximately five years.

Q. What products does Coors sell in Canada?

A. Coors and Coors Light.

Q. Do you — how do you sell Coors and Coors Light in Canada?

A. We have a licensee, Molson Brewing in Canada; and they are empowered to brew and to market our — those two designated products.

Q. Prior to Coors entering the Canadian market, Mr. Rechholtz, did you examine the Canadian brewing market?

A. Yes, we did.

* * * * *

[159]

REPORTER'S TRANSCRIPT
(Trial to Court: Volume II)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 10:00 a.m., on the 27th day of October, 1992, in Courtroom C-502, United States Courthouse, Denver, Colorado.

* * * * *

[164]

DIRECT EXAMINATION (resumed)

BY MR. OADE:

Q. Mr. Rechholtz, I want to ask you some questions about why Coors has decided to file this lawsuit and the type of relief Coors seeks and why. And let me start just by asking you to give us a little background on why Coors filed this case and what Coors hopes to achieve.

[165] A. Well, there are two basic reasons. The first reason is our research: It is indicated that beer drinkers had a misperception of the body and alcohol content of our Coors Banquet product. This is a very clean, crisp, fresh product; and the perception was that it was lower in alcohol than its major competitors. And we felt that alcohol content labeling would set the record straight and provide a level playing field for consumer choice.

The second reason has to do with the industry. It has been our feeling for some time that the brewing industry is in the forefront of where consumer alcohol beverage choice is going; that people in this country are opting for lower-alcohol, more moderate beverages, and that with alcohol content labeling, we would provide this trend and these consumers with a better basis for judgment on the products they would use within the brewing industry. And we felt that that would give our industry an advantage and also give the consumer the basis for informed choice.

Q. Now, Mr. Rechholtz, you indicated that the Coors Banquet Beer was equivalent to its competitors. Is that correct?

A. Yes. It's basically equivalent to its competitors on most characteristics. The alcohol level, if you select the competitors as being Budweiser and Miller, two major competitors, our alcohol content is within .2 or .3 of those products.

[166] Q. Would you turn to Exhibit 3, please, in the plaintiff's book, which shows the U.S. beer volume share by alcohol content, top 30 brands. I'll just ask you some questions about that. First of all, I'll ask you what it shows.

A. This exhibit arrays on two axes the alcohol content by volume against the share by those brands represented in the alcohol by volume categories. In other words, it gives you an indication of the volumetric importance of those brands falling within certain categories of alcohol content.

Q. It seems to show that if you add up 47 point—you have 4—I'm sorry. You have 47 percent of the products are between 4.5 and 4.9 percent. Is that correct?

A. Correct.

Q. And then 35.38 percent of the products are between 4 and 4.4; is that correct?

A. Yes.

Q. And if you add that up, it's what, about 83 percent?

A. Close to 83.

Q. Does that mean that 83 percent of the major products in this country are in that alcohol range?

A. Yes. 83 percent of the volume.

Q. You indicated that there was this misperception of Coors as not being within the range of these other products. How would alcohol content disclosures change this over time?

A. Well, it would provide the consumer immediately with [167] factual information by virtue of it being on the package, if that were the course that the ATF would take in requiring content labeling. Under that scenario, any consumer who was contemplating purchase or who made purchase would know by looking at one of the panels on the package what the alcohol content is. In fact, he could do comparison shopping, if he wished to, before he made his purchase.

Q. Are you aware as to whether or not malt beverage consumers in the United States—what their level of awareness of alcohol content is?

A. It's very poor. In fact, it's shockingly poor. The majority of U.S. beer drinkers can't even come close to estimating the alcohol content of their product.

Q. Would you turn to Exhibits 9 and 10, please, and ask—I'll ask you what those exhibits mean to you as a marketing professional.

THE COURT: Can I just clarify one thing? Is it also correct that most people don't understand the difference of percentage by weight or percentage by volume? The chart that you just referred to, I noted, was alcohol by volume, which means a higher percentage than it would be if it were alcohol by weight.

THE WITNESS: Yes, your Honor. There is a lot of confusion on that subject. The history would suggest that most people think of it in terms of alcohol by weight; and the [168] reference point is 3.2 beer, which has its roots in the military and the evolution of our own industry and the regulation of that industry even to this day. They seem to differentiate between 3.2 beer and regular or strong beer and very little in between.

THE COURT: But 3.2 beer is by weight. If you were to convert it to volume, do you know off the top of your head what it would be?

THE WITNESS: About 4.0, or light beer.

THE COURT: Just to make sure I understand—I think I do—the difference, there is a difference between weight and volume—is because alcohol weighs less than water.

THE WITNESS: That's my understanding.

THE COURT: All right. Continue with your next question.

BY MR. OADE:

Q. Would you explain Exhibits 9 and 10 and what those mean to you as a marketing professional on this issue that we've just talked about as to what consumers know and don't know about alcohol content?

A. Well, I'm looking at Exhibit 9, which compares the recognition of alcohol content of U.S. beer drinkers with Canadian beer drinkers; and in the U.S., 2—approximately 22 percent, 22.6 percent of the beer drinkers can correctly identify the alcohol content within a range of 2.6 percent, [169] whereas in Canada, 68 percent of the beer drinkers can correctly identify within that very broad range.

* * * * *

[173] Q. Mr. Reccholtz, I was asking you about Exhibit 9, and I believe you explained that. Would you now explain Exhibit [174] 10?

A. Yes. Exhibit 10 profiles the U.S. vs. Canada in terms of those respondents who mentioned a particular brand, their brand of beer. And they were asked if they knew the approximate alcohol content of it that beer. In the U.S., only 31 percent of the respondents could come within that range of correctly identifying the alcohol content, whereas in Canada, 72 percent of the consumers of the mentioned brand could identify correctly the alcohol content within that range.

THE COURT: I thought that chart on 10, it just says that it shows the percentage responding yes to the question.

THE WITNESS: Yes, ma'am; but the question was can you identify—I believe I'm correct in this—can you identify what is the approximate percent of alcohol content of the brand of beer you drink most often.

THE COURT: That was 9.

THE WITNESS: That was 9. And then the follow-up on 10, percent responding yes to the question. Among those responding yes, what percent could correctly know the percent of alcohol of that brand, know the approximate percent of that brand that they identified, is the way I understand the chart. If fact, the question reads, "You mentioned that Brand X," whatever that is, "is the brand of beer you drink most often. Do you know the approximate percent of alcohol of this brand?"

BY MR. OADE:

[175] Q. That's just the people that answered yes, they knew?

A. In other words, with the open-ended question, do you know the correct amount of alcohol; and they said, Yes, I do. I drink, let's say, Budweiser, and I know the correct percentage. And only 31 percent actually did of those who thought they did. Only 31 percent in the U.S. actually did, whereas in Canada, 72 percent could verify that they did, is my interpretation, your Honor.

Another way to phrase it, perhaps, which is a common research technique, when people say they correctly identify or remember a slogan, you ask them to prove it; and then you determine what percent could actually prove that that was a correct response. And it's a similar technique that was used here.

And in the U.S., only 31 percent could actually back up their claim that they knew the alcohol content in the U.S.

Q. Mr. Rechholtz, you indicated that beer is the beverage of moderation. Is that correct?

A. We believe that it is, yes.

Q. Would you explain what you mean by that?

A. Yes. People who use beverage alcohol, the overwhelming percent—and I believe it's 98 percent by an Anheuser-Busch study or one that they've been referencing lately—approximately 98 percent of the people who use alcohol beverages know that these beverages have an effect on coordination, an effect on mood amelioration. And our studies indicate that an increasing percent of the users of consumers of beverage alcohol desire to go to a lighter or lower alcohol product in the interest of moderation, in the interest of better dealing with responsible behavior.

And I think that the growth of the light beer category, although it is also calorie-related, and the rapid emergence of the nonalcohol beer category would suggest, would support this trend that we identify in our own research.

Q. Does Coors have any intention, or does Coors believe that if alcohol disclosure laws—if alcohol disclosures are permitted that Coors would market alcohol strength to build its market share?

A. No, we have no plan to do that. Our reason for being in business and anybody's reason in the brewing industry is to meet consumer demand for a particular product. And right now, the consumer demand is for lighter and lower alcohol beer. That's where our greatest growth is. That's where our opportunity is.

Clearly, there is also a much smaller consumer demand for a perceived-to-be-higher-alcohol product, malt liquors. Malt liquors have about 3 percent of the U.S. market. There is a much smaller segment that also wishes to have that product; but our interest and our growth is based on appealing to where the majority of the demand

is, and that is clearly not in [177] higher alcohol but in lower alcohol.

Q. Does Coors have a malt liquor product on the market?

A. No, we do not.

Q. I'd like to turn to Exhibit 1, please, which is the submission that Coors made to the ATF with some attachments. And I'd just like to ask you if these are samples of what Coors might do in the case subject to any limitations that may be placed on it.

A. Yes. These are examples of packaging and television advertising which indicate how we would suggest treating alcohol content if the—if a law were changed and if the BATF sought or committed to promulgate regulation on how it should be used. And in fact, we discussed this with the ATF, and these were just samples of how it might be done.

Q. Would you look at page 5 of 5—5 of Exhibit 1, where it's an ad that says, "Count on Coors for the facts." Do you see that?

A. Yes.

Q. Was that submitted to the ATF for approval?

A. Yes.

Q. Would Coors use something like this, or would Coors—would that depend on what the ATF regulations were?

A. Well, it would depend on ATF. But this was simply an example of how we might present the factual information on alcohol content without making any further claims.

[178] Q. Let's suppose the ATF were to say to Coors or to regulate, Well, you can show it on the label, you can make a simple statement in ads, but you can't do anything else. Would Coors have any objections top [sic]?

A. No, that would be perfectly acceptable. That would accomplish our dual objectives as a company and an industry.

Q. Now, you said you had discussion with—

THE COURT: Let me make sure I'm understanding. You can show it on the label and you can do what?

MR. OADE: Put a little line, a disclosure on the ad, your Honor. If you look at the Mark Harmon ad, you'll see that it's just a standard Mark Harmon ad. It's on Exhibit 1, page 4 of 5; and if you look down in the lower right-hand corner, the only difference between that Mark Harmon ad and the one we submitted to the ATF is a statement that says, "Contains 4.6 percent alcohol by volume."

THE COURT: I would be interested in what Mr. Rechholtz' answer would be if it was asked whether if they could put it on the label period and not use the content in advertising at all.

MR. OADE: He can answer that question.

THE WITNESS: That would be perfectly acceptable, your Honor. That would provide the consumer with factual information on which to make an informed choice. Clearly, advertising would provide you another opportunity to get that [179] information out; but we believe that the package, being the primary unit of purchase, would be quite satisfactory.

BY MR. OADE:

Q. Now, you indicated, Mr. Rechholtz, that you had some conversations with ATF about their position on whether consumers should have this information subject to ATF regulation. Is that correct?

A. Yes.

Q. And would you tell us about that, please.

A. Yes. We frequently meet with the ATF to discuss issues. They encourage that, in addition to sometimes if it

is an area that we're concerned about, seeking even pre-approval or pre-opinion of a particular marketing program or ad. And in the course of one of these discussions—I don't remember the exact date—we brought up the subject of alcohol content labeling, the fact that we felt it would be very appropriate, particularly in this day and age, when consumers are quite sophisticated and enlightened, that it's time they know this; that they know it for wine and spirits, and it seems totally illogical, in fact, almost a contradiction, not to have it available on malt beverages.

And they said they agreed, but the way that that would have to be achieved is, in fact, they suggested that we prepare advertising packaging, submit it to ATF. They would be forced to reject it under the FAA Act, and then we would pursue due [180] process on the subject.

Q. Now, you have heard some testimony about some point-of-sale materials that were used by Coors. You were here when Mr. Cates testified. Is that correct?

A. Yes.

Q. I would like to ask you some questions about the issues raised by Mr. Cates and particularly by Government's Exhibits AL and AI, if you could turn to those exhibits, please.

A. Okay.

Q. Do you have in front of you Exhibit AH, please; and I'm going to refer you specifically to the wallet cards—

A. Yes, I do.

Q. —that we talked about.

Now, what was the—what were these wallet cards and why—how did they come to be?

A. My recollection is that these wallet cards were prepared by a distributor; and again, I think it was only one distributor, but I'm not denying it might have been

more. My recollection is one distributor, who had them prepared in order to answer consumer questions that his salemen were encountering on and off accounts from consumers who either wanted to know the alcohol content of their beer or who challenged the fact that in their mind that Coors had less alcohol than competing products. And this distributor had them prepared to provide this factual information, much in the same way that we have an 800 line, where consumers call in wanting to know these facts and we respond, much in the same way that for many years we have annually produced with approval a fact brochure on our products which describes our various products, how they're made and what the alcohol content is.

Q. Is it your understanding, Mr. Rechholtz, that it's permissible to give consumers this information over the phone, or whatever, as long as you don't put it in the most appropriate place, which is the label?

A. That's my understanding. We are permitted to provide factual information in response to questions.

Q. Now, there was also an issue Mr. Cates raised about some apparent violations by Coors with respect to the use of the word "strong." Do you recall that?

A. Yes, I do.

Q. Would you explain that to the Court, please.

A. Yes. Again, dealing with the consumer misperception of our products, in the State of Iowa, they have a statute that requires product over certain alcohol level to be labeled "Strong"; and we approached the state authorities on that subject and asked permission to use a "strong" legend on our primary packaging in a certain fashion. They approved it, we did it, and the BATF did not think kindly of that, and that was part of this matter that was discussed yesterday.

Q. Was the reason ATF didn't think kindly is that you didn't [182] submit the label to them in the first place?

A. That's correct. Well [sic] dealt with the state authorities who do have the—under the 21st Amendment, who do do have the right to deal with those issues.

Q. Now, how did it come about that these two incidents—and I'd like to direct your attention to Exhibit A-1 with this supposed fine in the amount of \$150,000. Did that find cover in your judgment any violations of the current FAA Act on alcohol labeling?

A. No. We did not admit guilt in any of these matters, most especially not with regard to the wallet card.

Q. And how about the use of the word "strong" in Iowa?

A. No, we felt we were justified in doing that with state approval.

Q. And did any of these other matters that are addressed in this exhibit deal with alcohol content labeling?

A. No.

* * * * *

[183] Q. Now, I'd like to direct your attention to the period of time during which the Government was enjoined by this court from enforcing its regulations insofar as they prohibited disclosures of factual information. Were you here in the first court hearing, Mr. Rechholtz, back in '89?

A. Yes, I was.

Q. And was it your understanding that as a result of that court hearing, Coors could disclose factual information?

[184] A. That's my understanding.

Q. And did Coors during the approximate or a little more than two-year period of time between this court's ruling and the Tenth Circuit's decision—did Coors do any type of advertising of alcohol content to consumers?

A. We did not.

* * * * *

[187] Q. Let me turn to the product called Coors Extra Gold, Mr. Rechholtz; and I want to ask you some questions about Coors Extra Gold, about what type of product it is, why it was developed, and then I'll ask you about some of the things the Government says Coors intends to do with this product.

First of all, what is Coor Extra Gold?

A. Coors Extra Gold is a full-bodied premium beer with an alcohol content of approximately 4.9 percent by volume.

[188] Q. And when you say a "full-bodied beer," what is "body" when you refer to the body of a beer?

A. 'Well, generally, the consumer defines that in terms of a taste characteristic; and a full-bodied beer would be richer-tasting, it would have more mouth feel, it would have more inten[se] taste notes, malt, hops, etc. And the reason that we created this product was to fill the perceived void left by Coors for that—for those characteristics.

Q. Okay. Now, have you read the Government's trial brief in this case, Mr. Rechholtz?

A. Yes, I have.

Q. I'd like to ask you about their statement that the Government made with respect to Coors Extra Gold. I'll quote from page 30 and ask you to comment. Quote: "Coors both designed Coors Extra Gold to be higher in alcohol content than its competition and planned to market the beer based upon the higher alcohol content. Coors Extra Gold was introduced because the Coors brand was losing market share to its competitors, and Coors did not believe that the brand could be brought back to its previously successful position in the marketplace."

And they cite your deposition as authority for that statement. Is that a fair characterization of why Coors Extra Gold was introduced by Coors?

A. No, it is not. The first part of that statement is [189] inaccurate. The second part of the statement, which relates to our need for a new brand to hopefully pick up some of the lost Coors volume, is accurate. The first part is inaccurate.

Q. Now, on page 31, with respect to the introduction of the Coors Extra Gold product, the Government says in their brief, and I'll quote, "The timing is significant, because it was during that time period that Coors decided to pursue attempts to place statements of alcohol content in the labeling and advertising of its products. The timing strongly suggests that Coors created a higher alcohol product in anticipation of being able to sell that product based upon its alcohol strength relative to the rest of the market. The advertising campaign developed to sell Coors Extra Gold bears out this hypothesis."

Is that an accurate statement?

A. No, it is not.

Q. What about the timing of the introduction of Coors Extra Gold? Does that have anything to do with this case?

A. No, it had nothing to do with this case. In fact, you would have to go back in history. Prior to Coors Extra Gold, there was another brand we introduced in test called Coors Golden Lager; and this was our first attempt to address the need to have a new second premium brand to replace that volume lost by Coors. Golden Lager was not successful in test market. We—That project was succeeded by the Extra Gold project; and the design specs for that project were to provide a more [190] full-bodied, richer-tasting beer that would fill our need as a company for a brand at the higher end of that spectrum, the lower end being Coors Light, the middle being Coors, and the higher flavor intensity being the Extra Gold project.

Q. How long—

A. I should also add—and I think you heard expert testimony from Dr. Patino yesterday—that in the process of getting a fuller, richer product, you use more material and you have more fermentable material. And in most cases, you're going to get a slightly higher alcohol level, which is exactly what happened.

Q. Well, was Coors Extra Gold designed to have higher alcohol level?

A. Not specifically designed to have it. The primary design was a fuller-tasting, richer product.

Q. On page 29 of the Government's brief, the Government says, and I'll quote, "In essence, Coors believes that it cannot sell its beer effectively unless it can sell that beer based at least in part on alcohol content."

The Government then concludes that, quote, "Coors's attempt to sell Coors beer based on alcohol content could not be more apparent."

Is that a true statement?

A. No, that's not accurate. In fact, if you look at the facts, our greatest growth, our primary growth in the last 10 years, has come from light beer and nonalcohol beer, which either have [191] no alcohol or lower alcohol.

Q. I want to now turn to the product range of beers just in a general sense. What broad categories of types of beer or malt beverages are there?

A. Well, it depends on how you categorize those choices. You can look at it in terms of price points, which are not necessarily indicative, or you can look at it in terms of what we call regular beer and premium beer and super premium beer. Those are descriptors that generally relate to price points; or you can look at categorization by calories, light beer as opposed to regular beer, or you can look at it in terms of where the consumer, the beer drinker, places the product in terms of image on his perception scale.

Q. Do consumers differentiate between products based on price and, say, calories?

A. Yes, they do.

Q. Tell me on this scale here of beers, first of all, you have light beers. Is that corrects?

A. Yes.

Q. And then you have what other categories of beer?

A. Well, you have the light beer category, which is approaching a third of the market. Then you would have your so-called "premium" category, which is still the dominant market share; and that would include brands like Coors and Budweiser and Miller High Life.

[192] Then you would have the up-chart categories, which begins with brands like our own Killian, which we would call a super premium. Michelob would be a super premium.

Q. How about Lowenbrau?

A. That would be a super premium. Then you would have your imports, H[eine]ken, Beck's, etc., which would be at the high end of the category in terms of pricing and are also subcategorized as imports.

Then at the low end you have subpremiums. They're priced just under premium.

Then you would have what we term popular. That's the next lower price point.

And then you would have economy brands, and that would be the lowest price point.

Q. Where is the volume and the money to be made among those products?

A. In premium brands, regular premiums, and premium lights. That's where the vast volume is, that's where the margins are.

Q. We've heard testimony about the malt liquor segment of the market being 3 percent. Do you recall that testimony?

A. Yes.

Q. Do malt liquor drinkers share the taste preferences of the other 97 percent of malt liquor (sic) drinkers?

A. They do not.

Q. I would now like to turn to another topic area, Mr. [193] Rechholtz, which is drawing on your expertise as a marketing professional in this industry to give the Court an opinion of what we can expect if alcohol content disclosures are permitted in this country.

First of all, I'll ask you if alcohol content disclosures were permitted in the manner suggested in Exhibit 1, of Coors Exhibit 1, either on the label or in ads, do you have an opinion as to whether this will result in brewers' raising the alcohol content of their products or attempting to market alcohol strength?

A. Of course, this is speculative in the absence of it actually happening or being tested; but no, I don't think it would — it would result in brewers' making any significant changes in content up or down, for some of the reasons that Dr. Patino referenced yesterday. Also, you're talking about established brands like Coors Light and Budweiser and Miller, and so on; and when you begin tampering with alcohol levels of these brands, you change the taste characteristics and you run the risk of chasing away some consumers. And that's a considerable risk.

Q. Well, when you say it's speculative, Mr. Rechholtz, would Coors — do you have to speculate to give an opinion on what Coors would do if alcohol content labeling was allowed? Would Coors raise the alcohol content of its light beer or its Coors Banquet?

[194] A. No. I see no reason to do that. Our brands are competitive now. We'd simply be delighted that the consumer has this information and can make a choice.

Q. Now, what type of purchase patterns or trends would you expect would result, if any, from alcohol content disclosure laws?

A. Well, again, it is speculative. I think a number of things would happen. First of all, there are a percent of consumers who do not currently know that certain categories of beer have more or less alcohol. The users of malt liquor brands know that they have higher alcohol even in the absence of alcohol content labeling because of the way these products have been marketed over the years. They've been marketed as more macho, higher-strength products.

On the other hand, the light category, which is the highest category in the country and the fastest-growing category of major brands, is perceived as a consumer choice by virtue of fewer calories. A certain percent of those consumers also know that the light category also has less alcohol, but there is a fairly large percent that do not; and I think it may even accelerate the growth of the light category.

There is some precedence for this. In Canada, for example, in British Columbia, where light beers, I believe, have the highest penetration in Canada, consumers are very much aware, as they are all in all the provinces. In addition to [195] that, that province provides an incentive to purchase light beers, and they're way over-developed; so I could conceive of some changes in category development but basically favoring the more moderate categories as opposed to the higher alcohol categories.

There may be one other change, and that is within that malt liquor category, which is about 3 percent of the market, it is possible that there may be some brand shifting. Whereas now, they only guess what the alcohol level is, they would know and they might make some brand choices within that current category.

Q. Now, you were here yesterday when Dr. Patino testified about the taste test of a product being raised from 3.5 percent alcohol to 3.7 percent and how that polarized consumers on a blind taste test. Do you recall that testimony?

A. Yes, I did.

Q. According to Mr. — or Dr. Patino, one-third of the consumers didn't like it, one-third did like it better and one third didn't care. Do you recall that?

A. Yes. I do.

Q. Dr. Patino was asked about the marketing significance of that, and because he's not a marketing expert did not address that question.

What is the marketing significance of that type of polarization in a taste test resulting from just that small [196] increase in alcohol content?

A. That's a very dangerous scenario. Whenever you have as many people disliking something as like it, you general abandon it immediately.

What you look for are ratios which may be 3 or 4 to 1 likes vs. Dislikes. You also don't like a high neutrality base, because that means you haven't really excited a lot of people about anything. So what you'd really like to see is maybe 60 percent like it, 20 percent or less don't like it, some leaning toward it, but a small neutrality area. You're looking for the highest like to dislike ratio as possible.

Q. I'd now like to turn to what's happening and what the experiences have been in the Canadian marketplace. The first thing I'd like to ask you is in your judgment, is the Canadian marketplace a relevant comparison with respect to the issue before the Court? In other words, do we have anything to learn by looking at what happened in Canada through alcohol disclosure being required there?

A. Yes, I believe we have a lot to learn.

Q. And why do you believe the Canadian marketplace is relevant to these proceedings.

A. Well, there are several reasons. First of all is the proximity of Canada to the U.S. and to our media in the U.S. The vast majority of people — I think it's close to 85 percent — live within 100 to 150 miles of the border, so they have a lot [197] of influence from the United States, No. 1.

No. 2, in recent years, the Canadian market by virtue of consumer demand as well as brewer satisfaction of that demand has more closely paralleled some of the major trends in the U.S. Market. For example, light beer, which is still relatively new to Canada, quickly became a growth category until it achieved — at this point, it has about 15 percent of the market. And in fact, our Coors Light brand is the No. 1 light brand in Canada, which is an amazing feat when you consider starting from scratch, an American brand in a category that previously was not generally favored by Canadians.

* * * * *

[198] Q. How would you compare Canada and the United States in terms of similarities and difference in the marketplace?

A. It's very similar. There are, of course, some exceptions. The major exception would be the province of Quebec. And even there, there are probably more similarities than exceptions. The similarities are, first of all, the way we profile consumers in both markets is quite similar. We break them into [199] demographic groups, ranking from blue collar, lower income, to high income, higher educated. We look at the preference patterns among those groups. And the similarities between the two countries are very close.

For example, our own Coors light brand, which we're familiar with in both countries, profiles very similarly in

Canada and the U.S.: younger, better educated, more affluent, higher female, more enlightened, more trendy. That would be one example.

Other examples would be the recent trends, relatively recent, last 10 years in Canada, going from stronger beers to lighter beers. Same thing happened in the United States but about 10 years previous to that.

Sports: I mean the most recent example, it's hard to determine the difference between Toronto and Atlanta in the World Series. When Toronto went back to Canada, they had the same celebration. Even the President of the United States called the locker room.

It's amazing. These countries are so similar—in fact, it's exciting because the whole North American trade thing—I know it's a little irrelevant to this case—is exciting, because here are similarities with these two countries combining to form the greatest trade block in the world, and there are reasons for that.

Q. How about the western provinces, like British Columbia? [200] How do those provinces compare like Washington or Oregon or our western states?

A. Well, that would probably be the closest comparison; and I think that's a function of proximity of the major—the major population center in British Columbia with our Northwest. Also, there has been freer trade of beer between the United States and British Columbia over the years. I don't recall all of the reasons, but I think one of them—When there was a strike in Canada, it seemed to me that British Columbia was one of the first provinces that opened its arms to American products. And also, the cross-travel of the border and the purchase patterns cross-border have contributed to that. So I would say that's probably the best example.

Q. Okay. Now, is beer marketed in Canada fundamentally in the same way that it's marketed in this country

based on taste and image and the things you've identified, or are there differences?

A. Yes, it's very, very similar. There are a couple of differences, and those differences are basically dictated by Canadian statute.

Q. I had previously showed you or directed your attention to Exhibit—Coors Exhibit 3, which shows the bulk of American malt beverages sold between 1 and—I'm sorry—between 4 and 5 percent alcohol. Do you recall that exhibit?

A. Yeah. I can't find it, but I recall it.

[201] Q. Now, how does this exhibit showing the majority of the products in the U.S. sold between a range of alcohol content of 4 and 5—how does that compare to the range of alcohol content in the Canadian marketplace?

A. All right. Let me get this exhibit to be sure. But okay, the—way it shows is the skew of volume as arrayed against alcohol content; and it's a very similar pattern in Canada as compared to the U.S. While the total percentages are a little different—for example, in Canada, I think the bulk of the array is between 4.1 and 5.5. In the United States, it's between 4.0 and 5.0. But essentially, the same pattern.

Q. Now, according to Exhibit 3, the top 30 brands in the U.S., the malt liquor category has 2.69 of the top 30 brands. Is that correct?

A. Yes. In the top 30 brands. And if you were to take in all the brands, I think it would be approximately 3 percent.

Q. How does the malt liquor share in the U.S. Compare to the malt liquor share in Canada?

A. In Canada, it's about 1.8 percent. So it's less in Canada, significantly less.

Q. Mr. Rechholtz, do you see or are you aware of any evidence in Canada of products, malt beverages, being marketed in Canada based on alcohol strength?

A. I am not aware of any, certainly not with any significant brand.

[202] Q. Do you think that if that were going on in Canada, it would have come to your attention?

A. Yes. Our partner in Canada, Molson, would certainly bring it to our attention, both as information and possible action-ability.

Q. At one point in your marketing career, you worked, I believe, in the wines and spirits industry; is that correct?

A. That is correct.

Q. And what was your experience in wines and spirits?

A. Well, when I was with Ligget Group, which is a conglomerate, between 1974 and '77, almost four years—and I started out with Ligget Group in diversification, mergers and acquisitions, and corporate development; and in that role, I had to evaluate all of our company's divisions, which included wines and spirits. At the time, we were involved with Austin-Nichols. Principal brand was a bourbon. We were involved with IVD, which was J & B Scotch. We were involved with Caroline Importers, which had some imported wines. So I had fairly extensive experience during that period of time with Ligget.

Q. During your career in wines and spirits industry, did you see any evidence that distillers or wineries were marketing their product based on alcohol strength?

A. No. As a matter of fact, there was a great sensitivity to that in the spirits industry and I would say the wine industry as well. In the spirits industry, the sensitivity was historic. [203] And the industry went to great lengths to be sure not to market on strength. There are always fringe exceptions, someone trying to be opportunistic, but nothing that I can recall of significance.

In the wine industry, the basic scenario was to sell wine as a product of moderation that was best used with meals and food in a family or a social setting.

Q. Now, are you familiar with how alcohol content disclosures are made in the wine and distilled spirits industry?

A. Yes, I am.

Q. And how are those made?

A. They're made—in the spirits industry, they now do it by proof as well as alcohol content by volume; and in the wine industry, depending on the category of wine, it is by volume. I believe there is a—there are some breaks in that regulation in wine on the low end and the high end; but basically, the vast majority, and certainly table wine, is by volume, and it comes under regulation.

Q. Now, you indicated previously in your testimony that the trend in the marketplace was towards the light beers. Is that correct?

A. Yes, that is correct.

Q. Does that also include the low alcohol or nonalcohol beers?

A. Well, I would exclude the so-called "low alcohol" beers. And the best example of that was a product that we discussed [204] yesterday in someone's testimony; and that was the Anheuser-Busch LA product. That was a so-called "low alcohol" product; and that's in between nonalcohols, which are .5 or less, and light beers, which generally are 4.0. I think that product was 2.2, if I'm not mistaken. I'm recalling several years back.

And that product failed, and the reason it failed, in my opinion, was it wasn't a good product, No. 1; and No. 2, it didn't fill a legitimate need. It was neither a nonalcohol or a light beer. It was in that no man's land; and at that time, the consumer rejected it.

Today, the nonalcohol beers or the .5 or less — and most of those are usually about .2 or .3 — are doing very well, because they fill a legitimate need for a person who chooses to have, let's say, the taste of beer and all of the surrounding camaraderie and sociability but doesn't want alcohol. And that category is growing dramatically. And we have a successful entry in that called "Cutter."

On the other end, the light beers are also growing dramatically; and they have less alcohol as well.

Q. How is Coors Cutter doing in the marketplace?

A. It continues to grow. It's the No. 3 brand. We were the last one of the big three in the category, and so we're coming from behind; but we're showing gradual growth and distribution and volume. We're quite pleased with it. [205] Q. If Coors were to prevail in this lawsuit, Mr. Rechholtz, would Coors just go out and start putting alcohol content on its labels or using it in ads? What would be Coors' intention?

A. We would not. Our intention would be to wait for the BATF to promulgate the appropriate regulation on how that would be handled.

MR. OADE: That's all I have, your Honor.

THE COURT: Let me just ask one question about the so-called "nonalcohol." Some of the not only alcohols have .5 percent by volume alcohol.

THE WITNESS: The regulation, your Honor, I believe states that they must have .5 or less; and my recollection is that most of them are about .2 or .3, except for those that like Moosey, which we market in this country, which has no alcohol. And that's a reverse osmosis product. They do have trace amounts of alcohol, and that does —

THE COURT: That's what I was wondering. If people are, let's say, allergic to alcohol or have a very bad reaction to alcohol, or we have people who are recovering

alcoholics and who don't drink and they buy something that is indicated to be a nonalcoholic product, it nevertheless may have alcohol in it. Is that what you're testifying to?

THE WITNESS: Yes, I am; and I think that's an important issue. In fact, I can recall fairly recently there was a case where a recovering alcoholic did purchase one of [206] these products and to his dismay found out it did have small amounts of alcohol in it, did not know that.

MR. OADE: Your Honor, I believe that situation was corrected by the ATF in issuing low alcohol regs and to address that problem, kind of stretching the current law a little bit, in my opinion; but they said if you're going to put "nonalcoholic" on your beer, then you have to define it as .05 or less. And that's been a recent development.

THE COURT: Thank you. Cross-examination, please.

* * * * *

[211] Q. Now, I believe that on direct examination, you stated that one of the reasons why Coors wanted to place statements of alcohol content on its product labels was to correct a consumer misperception about the amount of alcohol in the Coors Banquet product; is that correct?

A. Yes.

Q. And isn't it true that Coors believed itself to be at a competitive disadvantage because of this consumer perception that Coors Banquet contained less alcohol than Budweiser and Miller?

A. Yes. In some quarters that would be a disadvantage; in others, it might be an advantage.

Q. I see, but in some quarters, it was a competitive disadvantage; correct?

A. Yes.

Q. And in fact, I believe you stated on direct examination that the Coors Extra Gold product was introduced in part to help you with that percentage of the market that was perceiving it as a disadvantage that Coors had less alcohol?

A. Yes, that's correct; but you must also understand that the perception is a guess at all the of several factors: taste, [212] flavor, body, mouth feel, alcohol.

Q. Including alcohol?

A. Yes.

Q. And that's because the consumer — this competitive disadvantage was caused because the consumer believes they're getting less of something, including less alcohol, if they were to buy the Coors Banquet product as opposed to the Budweiser or Miller; correct?

A. Correct.

Q. So you expect to be able to communicate alcohol content to consumers by placing a numerical statement of alcohol content on the product labels; correct?

A. We believe that would fill the bill.

Q. And in so doing, you expect to be able to alleviate this competitive disadvantage among those consumers to whom alcohol content is important?

A. It would help.

Q. Now, and that's because you expect that once consumers recognize that Coors contains as much alcohol as Budweiser and Miller, they might — some of them might buy Coors instead of buying Budweiser or Miller?

A. It would give us a level playing field on that characteristic.

* * * * *

[221] Q. Now, you had stated in your direct that volume that was lost by Coors was because of this con-

sumer perception that the Coors Banquet product had less alcohol. Correct?

MR. OADE: Objection, your Honor. I don't believe he said there was volume lost.

MS. RUSSOTTO: I believe that is what he said. Well, I'll ask him the question.

BY MS. RUSSOTTO:

Q. If I've mischaracterized your statement — I believe you did say that there was volume lost by Coors because of the perception. Is that correct?

A. I believe I said that was one of the reasons.

Q. And Coors Extra Gold was introduced to recapture that lost volume because of the consumer perception that Coors Banquet had less alcohol; correct?

A. Coors Extra Gold was introduced to give us an entry in the higher end of the full flavor market.

Q. And part of that was because of the volume that Coors beer had lost because of this consumer perception that it had less alcohol; right?

A. Well, no. No, you're combining several different things [222] and making your own conclusion.

The reality is that the Coors brand had been on a long-term volume decline for a number of reasons. One of those reasons was a consumer perception that it was a weaker, lower-alcohol product. One of the reasons.

The introduction of Coors Light helped to recapture a lot of that Coors volume for the company.

Q. Of Coors Light?

A. Yes.

Q. So let me see if I understand this correctly.

A. I want to finish the answer.

Q. Please. Go ahead.

A. Because I'm pursuing a train of thought.

Q. Go ahead.

A. Coors Light being a new product helped us to recapture volume that we had lost on the Coors brand. The introduction of Coors Extra Gold at the higher end of the category also enabled us to recapture some volume that was lost by the Coors brand. We also got new users who had never used Coors or Coors Light. It's not—it's a more complicated, multidimensional consideration than simply a direct correlation to the perception of alcohol, is my point.

* * * * *

[228] [Q.] What are the brands that Coors sells in Canada?

A. Coors and Coors Light.

Q. Okay. And what is the alcohol strength of the Coors beer in Canada?

A. Coors is 5.0 by volume, plus or minus .2.

Coors Light is 4.0, plus or minus .2.

Q. What is the alcohol strength of Coors Banquet in the United States by volume, since you've given it to me by volume in Canada?

A. I'd have to correct it. I know it by weight. It's 3.56 by weight. By volume, that would be, I believe, 4.4; 4.5. Dr. Patino has got his calculator.

THE COURT: You're asking him about which beer now?

MS. RUSSOTTO: I'm asking about the Coors beer, Coors Banquet beer: what the alcohol content is in Canada and what the alcohol content is in the United States.

THE COURT: Okay.

THE WITNESS: If someone would divide 3.56 by 88, I could provide you with an answer.

BY MS. RUSSOTTO:

Q. Math is not my strong point, but I'll say—

A. Well, I'll be glad to get my calculator.

MS. RUSSOTTO: Hold on just a moment the Preston, do you have that? I'll take whatever you've got.

[229] MR. OADE: Looks like 4.5 percent.

MS. RUSSOTTO: I thought he said 4.4 percent.

MR. OADE: 4.5 percent.

MR. RUSSOTTO: 4.5 percent. Okay.

BY MS. RUSSOTTO:

Q. So the alcohol content of Coors that's sold in Canada is higher than the alcohol content of the Coors that's sold in the United States; correct?

A. Yes.

Q. What is the average alcohol content of the light beers in Canada?

A. Approximately 4.0.

Q. And what is the average alcohol content of the premium beers in Canada?

A. 5.0.

* * * * *

[231] Q. Let me ask you: You I believe said earlier that the light beers in the United States enjoyed a 33 percent share of the market, approximately?

A. Approximately 33 and growing.

Q. And what is that share in Canada, if you know?

A. It's approximately 15.

Q. 15 percent?

A. Yes.

Q. And how much of the market in Canada is attributable to nonalcoholic beers?

A. Very little. It's a small fraction.

* * * * *

[233] Q. Are you aware—I want to leave aside the light beers for now, the 15 percent of the market that's attributed to light beers in Canada. And you've given me pretty

much what the market share is for the other categories. Are you aware what the market share for those other categories was before Canada changed its content label laws in 1976, what the product mix there was?

A. In 1976? No, I am not.

Q. Are you aware of what the product mix was 10 years ago of these categories of beer that are not light beer?

A. Yes. Light wasn't a factor, and that volume was in premium and ales and stouts.

* * * * *

[234] Q. Okay. What is the market share of Coors Banquet right now in Canada?

A. Oh, we have a relatively small share. We're down to about—I believe it's a 1.8.

Q. You said you're down to a 1.8. Was it higher before?

A. Yes.

* * * * *

[289] MS. RUSSOTTO: That's true, your Honor; but again, what we're concerned with here are the labeling restrictions [290] for malt beverages, not for wines or distilled spirits. And the fact is that malt beverages are the products that are consumed in more informal societal situations. You go to the ballpark and have a [beer]. You don't go to the ballpark generally and have a glass of Chablis.

I think that there has been testimony to that effect today, and I think it's particularly relevant that if alcohol content information is going to be provided that it be provided in an useful manner. Coors doesn't intend to do that.

I also wanted to note that there was some confusion about whether or not calories, statements of calories, were

permitted on premium beers. In fact, ATF ruling 79-17 permits brewers to state the caloric content, but they have to state it in the same way that would have to be stated on a light beer. In other words, they have to provide, I think, a statement of carbohydrates and a statement of other sort of product information with it. In other words, they have to provide the information in a way that's going to be useful to the consumer.

Now, there are other avenues for disclosing alcohol content, your Honor. Plaintiff characterizes the statute as totally prohibiting and totally suppressing the disclosure of alcohol content, and that's simply not true. Brewers are not prohibited from revealing alcohol content information to consumers who call or write and want the information. They're not prohibited from providing the information to consumer [291] groups or to the newspaper or to the television or radio media, and that could be disseminated.

THE COURT: What exhibit says that?

MS. RUSSOTTO: Well, I believe that Terry Cates testified to that, your Honor, yesterday afternoon; and I believe that Mr. Rechholtz this morning testified that he was aware that those avenues were available for the disclosure of alcohol content information.

THE COURT: I thought he said just the opposite. I thought he said he didn't know.

MR. RUSSOTTO: Well Mr. Cates is any event did testify that alcohol content can be reached through these different mechanisms, your Honor.

THE COURT: Go ahead.

MS. RUSSOTTO: And in fact, Mr. Cates also said that ATF is preparing for publication of the results of an ongoing study of alcohol content; and Mr. Cates said that ATF is going to publish this as a resource.

Mr. Rechholtz this morning also testified that Coors has its own 800 number. There are no regulations or statutory

provisions that prevent Coors from putting the 800 number on its product labels and saying, For information regarding this product, call 800 . . .

In addition, states can require that alcohol content be disclosed in malt beverage labeling and advertising. The [292] statute says that if you can't—the statute only prohibits statements of alcohol content to the extent that they are—unless the state provides otherwise, is the way it's stated. State law can allow brewers to put statements of alcohol content on their products.

THE COURT: Did you read in one of those depositions that Minnesota does have some laws to that effect?

MS. RUSSOTTO: I believe Minnesota is one of the states that has laws to that effect, your Honor. There are a number of others, also. Generally, what they provide is for a ceiling or a floor. In other words, if you're going to call yourself a malt liquor, you have to have at least 4.5 percent alcohol by weight, I think it is. If you're—if you have—you can put a statement of alcohol content on the product as long as the product has no more than 3.2 percent beer. You can't put it on if it has more.

Those are the types of state statutes that are on the books. I don't know of any that just flat out say, You can put alcohol content on there if you want to.

The point, your Honor, is that the statute only prohibits the brewers from communicating alcohol content information to consumers in a way that's likely to induce the consumers to consider alcohol content as a product attribute, and that's in the labeling and advertising of the product. It does not prevent them from disclosing alcohol content entirely [293] and by using other avenues to do so.

THE COURT: Let me just correct you on one thing. The statute does say, "unless required by state law." So the state law could not say, "Put it on if you want to." It must say, "You must put it on."

MS. RUSSOTTO: That's correct, your Honor. But state law can require it. That's right.

Now, I'd like to discuss the limited nature of the relief that the plaintiffs have said they seek here; and I believe that your Honor has indicated that you have some questions about that.

Coors has made much of the fact that it seeks only to place numerical statements of alcohol content on its products, and Coors claims it wants to leave intact ATF's ability to regulate these descriptive statements of content.

Coors has identified the two regulations it wants stricken, but what they fail to recognize is that these regulations are only implementing existing statutory provisions. They don't exist in a vacuum, and it's the statute that prohibits, quote, "statements of, or statements likely to be considered as statements of, alcohol content," end quote.

THE COURT: I'm sure Mr. Oade is very familiar with the statute. We talked about that in the last case and in this one. But in any case, go ahead.

MS. RUSSOTTO: All right. Plaintiff's proposed change to the statute involves just striking out the first three words, quote, "statements of, or," end quote.

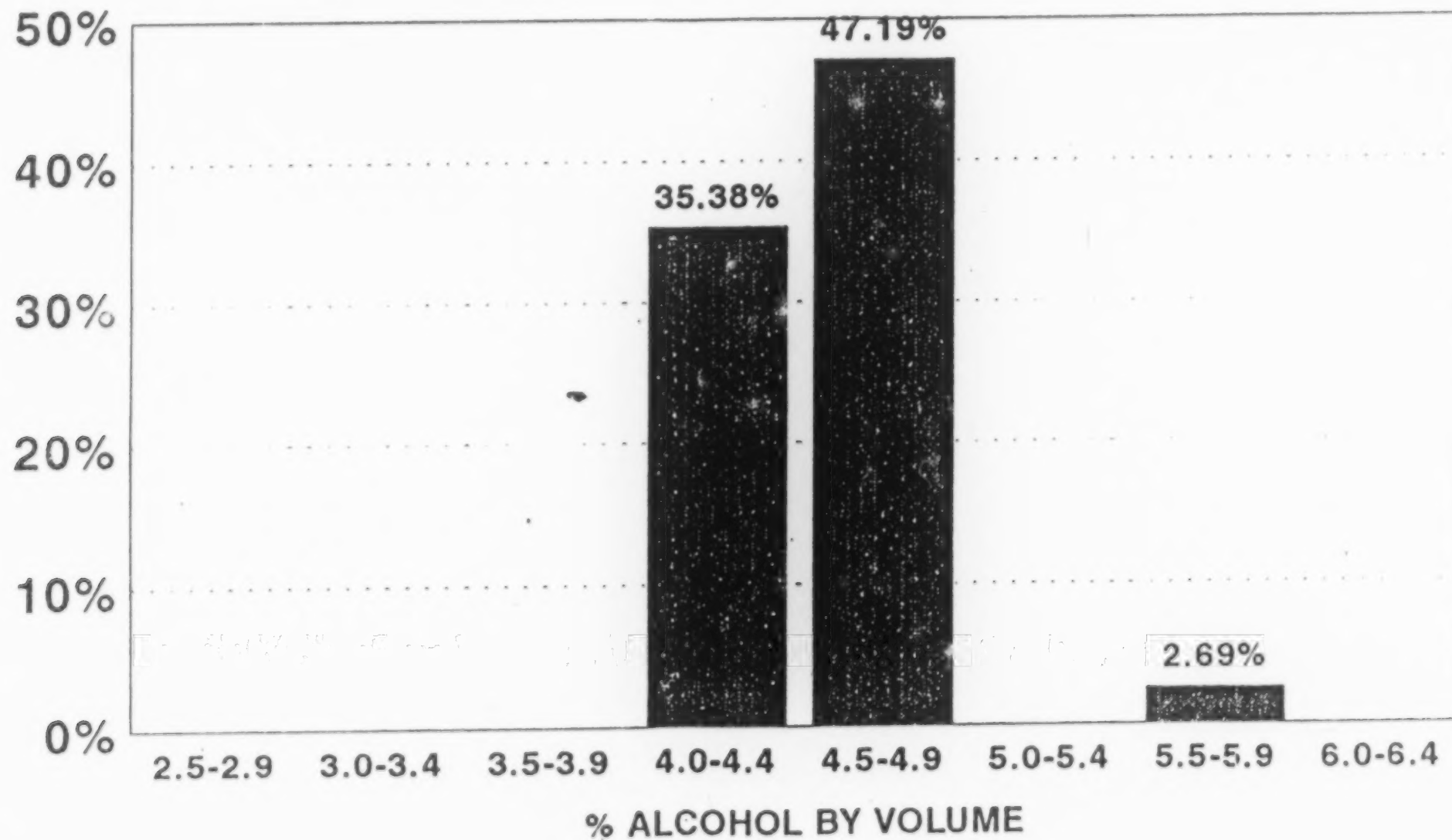
But that still makes illegal statements likely to be considered as statements of alcohol content, and that would include both descriptive and numerical statements of the alcohol content.

[Plaintiff's Exhibit 3A]

ALCOHOL % BY WEIGHT

PowerMaster	5.90
Olde English 800	5.64
Schlitz Malt Liquor	4.67
Colt 45	4.60
Heineken	3.91
Coors Dry	3.90
Keystone Dry	3.90
Coors Extra Gold	3.89
Killians	3.88
Michelob Dry	3.78
Bud Dry	3.76
Keystone	3.75
Old Milwaukee	3.73
Budweiser	3.71
Busch	3.70
Michelob	3.70
Strohs	3.69
Miller Genuine Draft	3.66
Miller High Life	3.61
Coors Repeal	3.54
Old Milwaukee Light	3.44
Milwaukee's Best	3.37
Strohs Light	3.35
Miller Lite	3.30
Coors Light Repeal	3.29
Michelob Light	3.28
Bud Light	3.28
Busch Light	3.28
Keystone Light	3.10
O'Douls	0.35
Sharp's	0.30

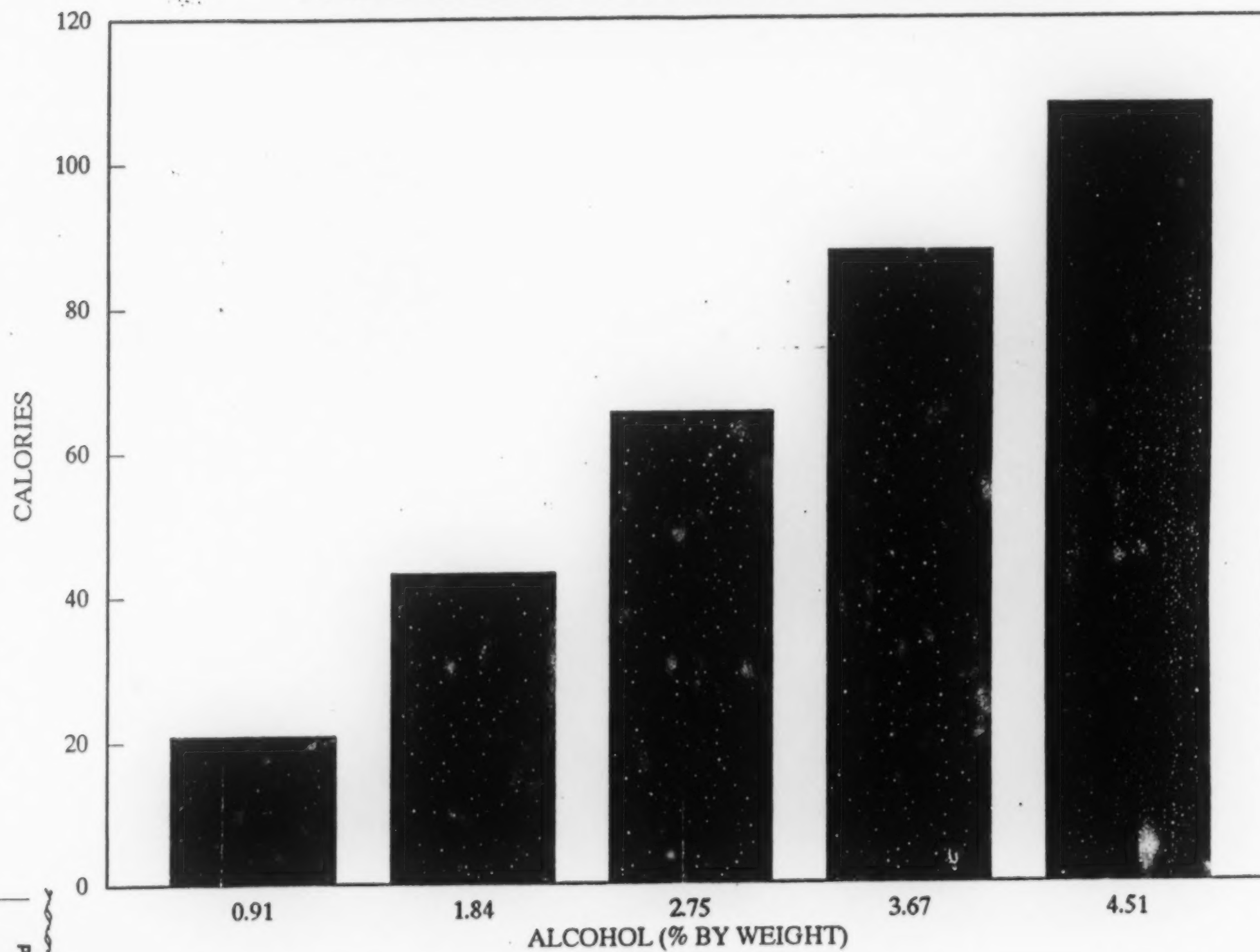
U.S. BEER VOLUME SHARE BY ALCOHOL CONTENT²⁸⁵
TOP 30 BRANDS
1991



■ SHARE OF VOLUME

PLAINTIFF
EXHIBIT
3
Case# 87-2
nonmonetary

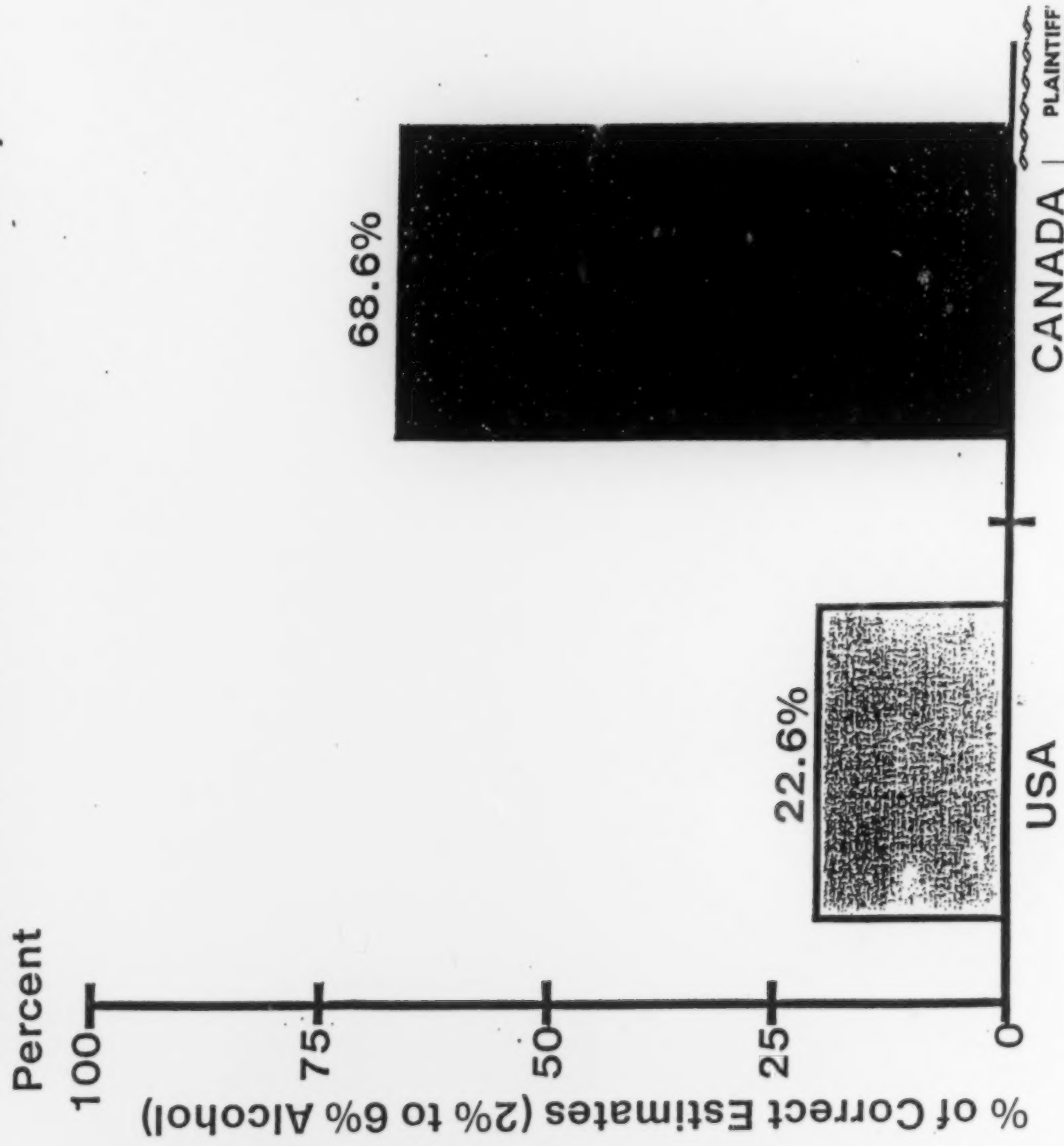
CALORIES IN ETHANOL SOLUTIONS



PERCENT OF CORRECT RESPONSES (2% TO 6% ALCOHOL) TO THE QUESTION:

287

“What is the approximate percent
alcohol content of (THE BRAND OF
BEER YOU DRINK MOST OFTEN)?”***

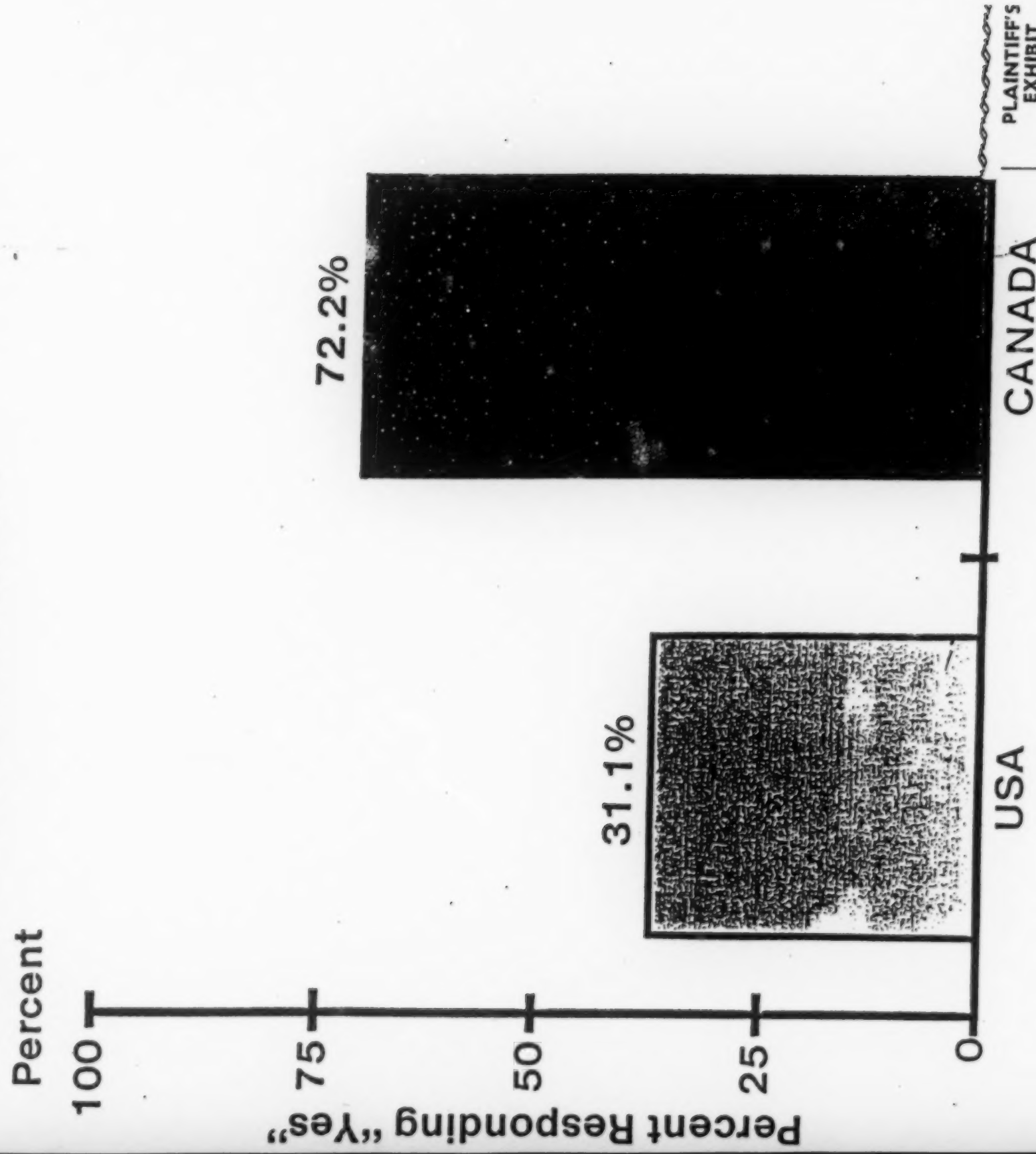


***Among all Respondents

PERCENT RESPONDING "YES"

TO THE QUESTION:

"You mentioned that (Brand) is the brand of beer you drink most often. Do you know the approximate percent alcohol of this brand?"



PLAINTIFF'S
EXHIBIT

Case# 87-CV-997

[Plaintiff's Exhibit 12]

Department of Health and Human Services

OFFICE OF
INSPECTOR GENERAL

YOUTH AND ALCOHOL:
A NATIONAL SURVEY

DO THEY KNOW WHAT THEY'RE DRINKING?

[Logo]

Richard P. Kusserow
INSPECTOR GENERAL

OEI-09-91-00653

* * * * *

[1]

INTRODUCTION

PURPOSE

This inspection surveyed junior and senior high school (7th through 12th grade) students to determine their knowledge about alcoholic and non-alcoholic beverages.

BACKGROUND

In response to public health concerns and the adverse health consequences of alcohol abuse, Surgeon General Antonia Novello requested that the Office of Inspector General (OIG) survey youth to determine their views and practices regarding alcohol use. These concerns mirror one of Department of Health and Human Services (HHS) Secretary Louis Sullivan's goals which is to reduce the prevalence of alcohol problems among children and youth. The

Surgeon General is particularly concerned about the similarities in the packaging of alcoholic and non-alcoholic beverages and young peoples' inability to distinguish between them. This is one of several reports prepared by the OIG relating to youth and alcohol.

The popularity of fruit-flavored alcoholic beverages skyrocketed in the 1980s

During the 1980s, alcoholic beverage companies introduced a variety of new products to the market. They offered consumers alcoholic beverages in a wide range of fruity flavors, vibrant colors, and attractive packaging. Introduced in 1981, wine coolers (1.5 to 6.0 percent alcohol by volume) are a mixture of wine and fruit juice or other flavoring, sometimes carbonated. Wine coolers offer consumers a sweet, fruity beverage with little or no alcohol taste. They are available in 12-ounce, screw-top bottles which are sold individually or in 4-packs. The most popular brands are Bartles & Jaymes and Seagram's.

The wine cooler market's explosive growth during its first 6 years prompted the liquor and beer industries to introduce mixed drink coolers (4.0 percent alcohol) and fruit-flavored malt beverage coolers (4.0 to 4.8 percent alcohol)¹ marketed in single-serve bottles. Bacardi Breezer, which looks and tastes much like a wine cooler, is an example of a mixed drink cooler. White Mountain Cooler is a malt beverage cooler available in flavors such as "Wild Raspberry," "Original Citrus," and "Cranberry Splash."

¹ Alcohol content of malted beverages is commonly measured in alcohol weight, rather than alcohol volume. The malted beverage coolers we observed contain 3.2 to 4.0 percent alcohol by weight.

While not new to the 1980s, fruit-flavored fortified wines became more mainstream with the controversial marketing of Cisco (20.0 percent alcohol). Fortified wines—[2] such as Thunderbird and Night Train—contain more alcohol than regular wines and historically have been considered "wino" beverages because they are inexpensive and available mainly in inner cities. Cisco offers consumers 20 percent alcohol fortified wine—4 to 5 times more than regular wine coolers—in popular wine cooler flavors such as peach, berry, and orange, marketed in bottles designed similarly to wine coolers. Cisco has become more widely available and popular than other fortified wines and now can be found displayed next to wine coolers not only in cities, but also in suburbs and smaller towns throughout the United States.

The Surgeon General has expressed an ongoing concern about Cisco because of its high alcohol content and potential for abuse. Cisco looks similar to wine coolers and has been implicated in a number of alcohol-related deaths and crimes, especially among youth. As a result, Dr. Novello has worked with the Federal Trade Commission to require Cisco to change its labeling and bottle shape, so it does not resemble a wine cooler.

While containing no alcohol, mineral water with fruit juice or flavor also became popular during the 1980s. These beverages offer a variety of fruit flavors in bottles that are very similar to the ones used for alcoholic coolers and Cisco. Brands include Sundance Sparkler and Mystic. While these alcoholic and non-alcoholic beverages offer a similar sweet, fruity flavor and are packaged and sold in attractively designed four-packs or single 12-ounce bottles, they are in fact very different. Minerals waters offer substitutes for soda pop. The coolers offer similar flavors

with 4 to 6 percent alcohol. Cisco offers the same flavors with 20 percent alcohol.

METHODOLOGY

We randomly selected 8 States, 2 counties per State, 2 schools per county, and 30 students per school. The States were: California, Colorado, Florida, Illinois, Louisiana, New York, Ohio, and Pennsylvania. We completed structured interviews with a total of 956 junior and senior high school students.

We purchased alcoholic and non-alcoholic beverages from stores close to each school. During the interviews, we displayed a panel of these beverages and asked each student (1) whether each beverage did or did not contain alcohol, (2) which contained the most alcohol simply by looking at the bottles, and (3) which contained the most alcohol after reading the labels. We included Cisco in all interviews regardless of whether it was available in that area.

The appendix contains a more detailed description of our methodology and beverage selection.

* * * * *

[Illustrations Omitted in Printing]

[5]

FINDINGS

TWO OUT OF THREE STUDENTS CANNOT DISTINGUISH ALCOHOLIC BEVERAGES FROM NON-ALCOHOLIC BEVERAGES

Students confused alcoholic coolers with mineral waters that are similar in color, labeling, and packaging. Also, some alcoholic coolers are not clearly labeled as alcoholic. Students were most often confused by coolers that do not state clearly on the front of their labels what kind of beverages they are. An example is Bacardi Breezer (page 7).

Students correctly identified alcoholic beverages more often when shown clearly marked, popular, and well-advertised name-brand alcoholic beverages, especially beers and Bartles & Jaymes wine coolers. More than 60 percent of the students did not distinguish between alcoholic and non-alcoholic beer—such as Sharp's and O'Doul's. Although non-alcoholic beer contains less than 0.5 percent alcohol, some students assumed these products contained the same amount of alcohol as regular beer, because the popular Miller and Anheuser-Busch slogans appear directly under the product name.

Younger students were more likely to mistake an alcoholic beverage for a non-alcoholic one. Seventy-three percent of students ages 15 and younger erred or did not know that at least one of the alcoholic beverages contained alcohol. Sixty percent of those 16 and older made the same mistake.

PERCENT ANSWERING INCORRECTLY OR "DON'T KNOW" TO THE QUESTION, "DOES THIS CONTAIN ALCOHOL?"

<i>Tropical Passion, Pink Passion, Purple Passion</i> (wine cooler or liquor)	61.3%
<i>Cisco</i> (fortified wine)	36.0
<i>Bacardi Breezer</i> (mixed drink cooler)	25.5
<i>White Mountain</i> (malted beverage cooler)	18.0
<i>Bartles & Jaymes</i> (wine cooler)	9.6
<i>Schlitz</i> (malt liquor)	8.8
<i>Michelob</i> (beer)	4.2
<i>Miller, Miller Genuine Draft</i> (beer)	4.1
<i>Budweiser</i> (beer)	1.2
<i>Colt '45</i> (malt liquor)	0.7

[6] Students sometimes believed that mineral waters with juice contained alcohol. Several brands of mineral water now use foil labels to cover the cap. This gives them an appearance similar to some alcoholic beverages. Thirty-four percent of all students failed to identify mineral waters as non-alcoholic.

The similar appearance of alcoholic coolers and mineral waters has been used by students to fool retail clerks into selling them alcoholic beverages, according to one junior high school teacher. In one area, students place wine coolers into mineral water four-pack containers. Because of their similar appearance, the clerks fail to notice that the beverages have been switched.

On average, students were unable to distinguish between alcoholic and non-alcoholic beverages 3 out of 10 times.

* * * * *

[14]

RECOMMENDATIONS**THE SURGEON GENERAL SHOULD WORK WITH BEVERAGE INDUSTRY, STATE, AND FEDERAL OFFICIALS TO IMPROVE THE LABELING AND PACKAGING OF ALCOHOLIC AND NON-ALCOHOLIC BEVERAGES**

A coordinated effort should ensure that (1) total alcohol content of all beverages—including beer and malt liquor—is clearly displayed and understandable and (2) alcoholic and non-alcoholic beverages are clearly distinguishable.

In order to accomplish this, it may be necessary to seek repeal of the Federal law prohibiting disclosure of alcohol content on beer containers. Other options would be to convince States to enact legislation requiring content disclosure or to seek voluntary industry standards.

THE SURGEON GENERAL SHOULD CONSULT WITH PUBLIC AND PRIVATE AGENCIES TO DEVELOP, IMPROVE, AND PROMOTE EDUCATIONAL PROGRAMS WHICH WOULD INCREASE STUDENT AWARENESS OF ALCOHOLIC BEVERAGES AND THEIR EFFECTS

This recommendation is similar to one that appears in the OIG report entitled "Youth and Alcohol: A National Survey—Drinking Habits, Access, Attitudes, and Knowledge." In addition to consulting with other HHS components, the Surgeon General should work with the U.S. Departments of Education, Transportation, and Justice, the alcoholic beverage industry, and public interest groups to implement this recommendation. The educational programs should include (1) teaching students about the total alcohol content of different beverages and (2) eliminating myths about wine coolers and beer.

* * * * *

American National Can Company will not be responsible, after the return of black and white proofs, color separations and color proofs with a customer signature, for any errors, omissions, etc., overlooked by the customer. By preparing artwork or proofs, American National Can Company assumes no responsibility for noncompliance with local, state or Federal laws and regulations including, but not limited to, the Federal Food, Drug and Cosmetic Act and the Federal Fair Packaging and Labeling Act or for conflict with the rights of third parties in connection with trademarks, designs, labels, copyrights or unfair competition, and the customer agrees to indemnify and hold American National Can Company harmless for any and all damages sustained by the American National Can Company as a result of any action by a third party based on any such grounds.

PLAINTIFF'S
EXHIBIT

13
Case# 87-2-977

APPROVED DATE _____

APPROVED BY _____

RC [signature] 3/25

TYPE
LIMIT

PLAIN METAL

TYPE
LIMIT

AMERICAN-NATIONAL GRAPHIC ARTS CENTER

ARTWORK 77421 3209-5
CONTROL

CUSTOMER STROH WINSTON SALEM
COLORS WHT GOLD LT RED DK RED

JOB ORDER
SIZE
B&W DATE 03-01-91

KEY

[Plaintiff's Exhibit 14]

BEVERAGE STUDY

REPORT FOR:
BRADLEY, CAMPBELL & CARNEY,
ATTORNEYS AT LAW

[1] REASONS FOR THE INVESTIGATION

Content labeling of many food and beverage products has been increasing over the years. One product which does not list its alcoholic content is beer.

C/J Research, Inc. was contacted by Bradley, Campbell & Carney and asked to conduct a study designed to determine the current level of knowledge among beer drinkers with respect to the alcohol content of beer. In addition, interest also was expressed in gathering information to help determine if and to what extent beer drinkers might desire this information as well as to determine their reasons for wanting or not wanting to know about the alcohol content of beer.

[2] RESEARCH PROCEDURE

A total of 500 interviews were conducted with consumers (250 women and 250 men) between May 12th and May 24th, 1987. The interviews were conducted via long distance telephone lines from a centrally monitored telephone interviewing facility using a national probability sample which included telephone numbers for the forty-eight contiguous states within the United States (excluding Alaska and Hawaii). The sample used in this study is a random sample which is computer generated. A sample of this nature ensures that unlisted telephone numbers and

recently issued numbers will be included in the interviewing process.

For each interview, the interviewers were instructed to speak with a male in the household who had the most recent birthday and who was of legal drinking age (for *that* particular state) or older, (Colorado—18 years, Ohio and Wyoming—19 years, all other states—21 years). If this person was unavailable, the interviewers were instructed to speak to a female in the household who had the most recent birthday and was of legal drinking age or older. This further serves to randomize the interviewing procedure.

In order to participate, respondents had to meet a number of criteria. All respondents in the study were legal drinking age or older, and reported that they had consumed beer during the previous month.

People were excluded from participation if they were a member of a family or have a close friend who worked for an advertising agency, a marketing research firm, or a manufacturer, distributor, or retailer of beverage products.

Respondents who qualified for the study were asked, "You mentioned a moment ago that you have recently had beer to drink. What brand of beer do you drink most often?" If regular or light beer was not specified, the respondents were asked "Is that (*BRAND*) regular or light you drink most often?"

Next, the interviewers asked, "You mentioned that (*BRAND*) is the brand of beer you drink most often. Do you know the approximate percent alcohol content of this brand?" All consumers who responded "yes" to this question were further queried, "What is the approximate percent alcohol content of (*BRAND*)?" The response was recorded exactly as was stated by the respondent.

Following this, the interviewers prepared to read a list of beer brands by saying, "Now I will read the names of

some brands of beer and would like you to tell me what is the approximate percent alcohol content for each brand. What is the approximate alcohol content of (*BRAND*)?" The list of beers about which respondents were questioned is as follows: Regular Budweiser, Miller High Life, Regular Coors, Michelob, Heineken and Miller Lite. Of course, the order in which the beers were read was rotated to control order bias. If the brand of beer which the respondent stated he or she drinks most often was included in the brand list, the respondent was not asked about it again.

[3] Once this was accomplished, the respondents were asked, "Do you yourself, feel that the alcohol content of beer should or should not be shown on the bottle or can?" They then were asked, "Why do you say that?" The response was recorded exactly as stated by the respondent.

Finally, all respondents who said that the alcohol content of beer should be shown on the bottle or can were asked, "Other than just curiosity, why would you want to know the alcohol content of the beer you drink?" Again, the response was recorded exactly as stated.

[4] SUMMARY OF KEY FINDINGS

- Less than one-third (31.1%) of the beer drinkers interviewed for this study claim to know the approximate alcohol content of the beers they drink most often.

In total, of the beer drinkers interviewed:

- Less than one in four (22.6%) appears to actually know the content of the beer they drink most often. (NOTE: Responses ranging from 2% to 6% alcohol content have been counted as correct).
- Of those beer drinkers who claimed to know the alcohol content of the beer they drink most often, 72.9 percent were correct.

- When questioned about other brands of beer, similar findings were noted. Approximately one-fourth (21.0% to 28.6%) of the respondents mention alcohol content levels for beers considered correct. Nearly three-fourths of the respondents, did not know, were not sure, or were incorrect with respect to the alcohol content of the selected beers.
- More than 8 out of 10 (82.6%) respondents feel the alcohol content of beer should be shown on the bottle or can.
 - the primary reasons for wanting to know this information relate to a desire on the parts of many respondents to know what they are drinking. Other reasons mentioned include the use of this information to avoid drinking too much or to know when not to drive if they have had too much to drink.
- If this study were repeated one hundred times, 95 times out of 100 we would expect the results to be within 5 percentage points of these figures.

TABLE 1

[5]

Q. 2A. YOU MENTIONED THAT (BRAND Q. 1A) IS THE BRAND OF BEER YOU DRINK MOST OFTEN. DO YOU KNOW THE APPROXIMATE ALCOHOL CONTENT OF THIS BRAND?

Total Number of Respondents	(500)
Yes	31.1%*
No	63.1
Don't Know/Not Sure	5.8
	100.0%

*ALCOHOL CONTENT SUMMARY

Less than 2%	1.3%
2 to 6%	72.9%
Over 6%	25.2%
	100.0%

BASE: (155)

TABLE 2

[6]

Q.2B/3 WHAT IS THE APPROXIMATE PERCENT ALCOHOL CONTENT OF (BRAND RESPONDENT DRINKS MOST OFTEN/BEGIN WITH X'D BRAND)?

Brand Consumed Most Often**	Less than 2 Percent	2 to 6 Percent	More than 6 Percent	Don't Know/ Not Sure*	Number of Respondents
	0.4%	22.6%	7.8%	69.2%	(500)
Regular Budweiser	1.0	26.8	13.6	58.6	(500)
Miller High Life	1.4	28.2	13.0	57.4	(500)
Regular Coors	1.2	27.6	13.2	58.0	(500)
Michelob	0.8	26.2	13.8	59.2	(500)
Heineken	0.8	21.0	16.0	62.2	(500)
Miller Lite	1.0	28.6	10.4	60.0	(500)

* Includes respondents who said "No" or "Don't Know/Not Sure" when asked Q. 2A "You mentioned that (BRAND Q.1A) is the brand of beer you drink most often. Do you know the approximate percent alcohol of this brand?"

** All "Most Often" brands are included in this row including: Regular Budweiser, Miller High Life, Regular Coors, Michelob, Heineken, and Miller Lite.

[7]

TABLE 3

Q.4A. DO YOU, YOURSELF, FEEL THAT THE ALCOHOL CONTENT OF BEER SHOULD OR SHOULD NOT BE SHOWN ON THE BOTTLE OR CAN?

Total Number of Respondents	(500)
Should be shown	82.6%
Should not be shown	3.2
Don't Know/Not Sure	<u>14.2</u>
	100.0%

[8]

TABLE 4

Q.4B WHY DO YOU SAY THAT?*

(By answer to Q. 4A)

	<i>Should be Shown</i>	<i>Should Not Be Shown</i>	<i>Don't Know/ Not Sure</i>
TOTAL NUMBER OF RESPONDENTS	(413)	(16)	(71)
AMOUNT OF ALCOHOL CONTENT AND DRINKING ISSUES—NET	59.6%	6.3%	2.8%
(Will/Would know what you are drinking; Will/Would know alcohol con- tent you are drinking; Should know amount of alcohol/what you are drinking)			
INFORMATION ISSUES—NET	16.2	—	1.4

TABLE 4—Continued

	<i>Should be Shown</i>	<i>Should Not Be Shown</i>	<i>Don't Know/ Not Sure</i>
(For information purposes; other alcoholic beverages show content)			
CONSUMER CONCERNS— NET	5.6	—	—
(Drinking and driving men- tions; health mentions)			
DOESN'T MATTER/NOT IN- TERESTED NO PAR- TICULAR REASON—NET	1.7	43.8	69.0
OTHER—NET	1.7	18.8	8.5
Miscellaneous Mentions	9.9	25.0	5.6
Don't Know	5.3	6.3	12.7

* See appendix for additional detail

[9]

TABLE 5

Q.4C OTHER THAN JUST CURIOSITY, WHY
WOULD YOU WANT TO KNOW THE
ALCOHOL CONTENT OF THE BEER YOU
DRINK?

— ASKED AMONG THOSE RESPONDENTS
WHO SAID THE ALCOHOL CONTENT OF
BEER SHOULD BE SHOWN (Q. 4A)

NUMBER OF RESPONDENTS (413)

AMOUNT OF ALCOHOL—CONTENT
AND DRINKING ISSUES—NET 39.7

(Will/Would know what you are drinking;
Let people know how much they can
drink; Would know alcohol content you
are drinking)

CONSUMER CONCERNS—NET 17.4

(Drinking and driving mentions; health
mentions)

DOESN'T MATTER/NOT IN-
TERESTED/NO PARTICULAR
REASON—NET 15.5

INFORMATION ISSUES—NET 11.4

(For information purposes; compare dif-
ferent beverages, brands; Would help
in selecting the beer to drink)

TABLE 5 - Continued

OTHER - NET	9.4
Nothing	0.2
Miscellaneous Mentions	3.1
Don't Know	3.1

* See appendix for additional detail.

* * * * *

[DEFENDANTS' EXHIBIT B]

[SEAL OMITTED]

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO
AND FIREARMS

221 Main Street, 11th Floor
San Francisco, California 94105-1992

CC:SF:LLN
11242

[Oct. 2, 1991]

CERTIFIED MAIL - RRR

Mr. Minott Wessinger, President
McKenzie River Corporation
330 Townsend Street, Suite 3250
San Francisco, California 94107

Re: St. Ides Malt Liquor Advertising

Dear Mr. Wessinger:

As you know, the Bureau has conducted an inspection concerning your company's radio and television advertising of St. Ides malt liquor by the rap musician, Ice Cube. Our inspection disclosed that McKenzie River was responsible for the airing of seven radio advertisements and two television advertisements in 10 cities, New Jersey and the District of Columbia between August 1990 and July 1991.

We have reviewed these advertisements and have determined that phrases in some of these advertisements are disparaging of the competitor's product and other advertisements contain statements likely to be considered as statements of the alcohol content of St. Ides malt liquor. Such advertisements violate 27 U.S.C. § 205(f) and 27 C.F.R. §§ 7.54(a) (2) and 7.54(c). For example, the

"Crooked I" radio advertisement contains the phrase, "Forget 8 ball, that beer makes you earl." This is a disparaging reference to Pabst's Olde English 800. The "King Tee's Beer Stand" radio advertisement contains the phrase, "It'll put hair on your chest." This is a statement likely to be considered as a statement of alcohol content. These examples are only representative, other advertisements contain similar violative phrases.

We are contemplating the issuance of an order to show cause why your wholesaler's Federal Alcohol Administration Act basic wholesaler's permit should not be suspended based upon these advertising violations.

Pursuant to 27 C.F.R. § 200.37, we hereby offer you an opportunity to attend a conference in this office to discuss the facts and arguments concerning these violations and to submit offers of settlement.

If you wish, you may be represented at this conference by an attorney or other person and we are enclosing ATF F 1534, Power of Attorney, which you should complete if you wish such a representative. To arrange a date and time for the conference, please contact ATF Specialist Susan Hill at (415) 744-7011. If you do not contact Ms. Hill within 15 days of your receipt of this letter, we will issue an order to show cause.

Sincerely yours,

/s/ HARRY J. ADLER

Harry J. Adler
Regional Director (Compliance)

Enclosures

[DEFENDANTS' EXHIBIT C]

[SEAL OMITTED]

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO
AND FIREARMS

221 Main Street, 11th Floor
San Francisco, California 94105-1992

CC:SF:LLN
11242

[Nov. 26, 1991]

REGISTERED MAIL - RRR

Mr. Minott Wessinger, President
McKenzie River Corporation
330 Townsend Street, Suite 3250
San Francisco, California 94107

Dear Mr. Wessinger:

In connection with the conference held in this office on October 29, 1991, we are hereby serving you with an Order to Show Cause (Form 5000.6) which sets forth the basis for the agreed upon stipulated suspension of your Wholesaler's Basic Permit issued under the Federal Alcohol Administration Act, 27 U.S.C. § 201 *et seq.*

We have agreed that a suspension of three days is appropriate in this case. In order to accomplish the agreed upon suspension, it will be necessary for you to waive your right to a hearing and your right to file an answer to the Order to Show Cause. The enclosed Suspension Agreement will accomplish these waivers. Please sign and date this agreement and return it to this office. Once the signed agreement is received in this office, I will issue my decision and an order suspending your permit for the agreed upon period. We will provide you at least fifteen days notice pri-

or to the imposition of the suspension.

You should be aware that if a permittee elects to contest the imposition of a suspension, the following regulations apply. Section 200.60 of Title 27, Code of Federal Regulations, provides that if a hearing is desired, a written request for such a hearing must be submitted to the regional director (Compliance) within 15 days after receipt of an Order. Section 200.64 of Title 27, Code of Federal Regulations, provides that if a such a hearing is requested, a written answer shall be filed with the administrative law judge and served upon the regional director (Compliance) within 15 days after service of the Order. At a hearing, a permittee may be represented by counsel, has the right to present evidence through testimony and documents, and to examine and cross-examine witnesses as provided by Title 27, Code of Federal Regulations, Sections 200.31 and 200.83. By accepting the terms of the Settlement Agreement, you will waive the application of these regulations.

Since the resolution of this matter also includes the submission of a \$15,000 monetary offer in compromise, we are also enclosing copies of ATF F 5640.2, Offer in Compromise, for you to complete and return to this office. With respect to section three of the form, we are enclosing a list of the violations to be comprised which you may simply reference in section three and attach to the form. You should complete all the remaining sections on the form and return it to this office with the remittance. You will subsequently be advised in writing regarding the acceptance of your offer.

If you have any questions, please contact Larry Nickell at (415) 744-9437.

Sincerely yours,

/s/ HARRY J. ADLER

Harry J. Adler
Regional Director (Compliance)

Enclosures

cc: Paul Crotty, Esquire
Donovan Leisure Newton & Irvine
with enclosures

* * * * *

ATT F 5000.6

I.

On 40 occasions on or about and between November 1990 and May 1991, McKenzie River Corporation caused the airing of a radio advertisement entitled "Crooked I Revised" which contained the lyric "Forget 8 ball, that beer makes you earl" on radio station WPGC in Washington, D.C. These airings of this advertisement were willful violations of 27 U.S.C. § 205(f) and 27 C.F.R. § 7.54(a) (2) as the advertisement disparaged a competitor's product, Olde English 800 malt liquor.

II.

On 36 occasions on or about and between March and July 1991, McKenzie River Corporation caused the airing of a radio advertisement entitled "Do You Like" which contained the lyric "What is this, some more bullshhh...Took a sip and had to spit, 'cause I ain't with the beer called the OE" on radio stations WJLB and WGPR in Detroit, Michigan. These airings of this advertisement were willful violations of 27 U.S.C. § 205(f) and 27 C.F.R. § 7.54(a) (2) as the advertisement disparaged a competitor's product, Olde English 800 malt liquor.

III.

On 101 occasions on or about and between August 1990 and May 1991, McKenzie River Corporation caused the airing of a radio advertisement entitled "King T's Beer Stand" which contained the lyric "And it will put hair on your chest" on radio stations WRKS and WBLS in New York, New York. These airings of this advertisement were willful violations of 27 U.S.C. § 205(f) and 27 C.F.R. § 7.54(c) as the advertisement contained a statement likely to be considered as a statement of alcohol content.

IV.

On 55 occasions on or about December 1990, McKenzie River Corporation caused the airing of a radio advertisement entitled "Christmas 1990" which contained the lyric "It'll probably make you faint, and you'll paint the town red, After taking a forty dog to the head" on radio stations WRKS and WBLA in New York, New York. These airings of this advertisement were willful violations of 27 U.S.C. § 205(f) and 27 C.F.R. § 7.54(a) as the advertisement contained a statement likely to be considered as a statement of alcohol content.

V.

On 147 occasions on or about and between March and July 1991, McKenzie River Corporation caused the airing of a radio advertisement entitled "Do You Like" which contained the lyric "You looked and it was gone, grabbed me a 40 just to get my buzz on, 'Cause I needed just a little more kick, hooked like a fish after just one sip" on radio stations WRKS and WBLS in New York, New York; WJLB and WGPR in Detroit, Michigan; and WUSL and WDAS in Philadelphia, Pennsylvania. These airings of this advertisement were willful violations of 27 U.S.C. § 205(f) and 27 C.F.R. § 7.54(c) as the advertisement contained a statement likely to be considered as a statement of alcohol content.

VI.

On 255 occasions on or about and between October 1990 and June 1991, McKenzie River Corporation caused the airing of a television advertisement entitled "Ice Cube at the Apollo" which contained the lyric "And it will put hair on your chest" on television stations WNYU, Paragon Cable, and Gateway Cable in New York, New York and WPHL, Metrobase, Comcast Cable, Cable Ad Net, and

TKR Hamilton in Philadelphia, Pennsylvania. These airings of this advertisement were willful violations of 27 U.S.C. § 205(f) and 27 C.F.R. § 7.54(c) as the advertisement contained a statement likely to be considered as a statement of alcohol content.

Accordingly, the Regional Director (Compliance) has reason to believe, and does believe, that McKenzie River Corporation has willfully not conformed its wholesaling operations with the provisions of law and regulations and further believes that the Corporation's Basic Permit should be suspended pursuant to 27 U.S.C. § 204(e) and 27 C.F.R. Part 200.

Suspension Agreement

1. McKenzie River Corporation, CA-P-6482, through its President, Minott Wessinger, waives its right to file an answer and its right to a hearing and admits the allegations contained in the Order to Show Cause, docket no. W-FA-405.
2. McKenzie River Corporation, CA-P-6482, through its President, Minott Wessinger, and the Regional Director (Compliance) agree that the wholesaler's basic permit issued to McKenzie River Corporation will be suspended for a period of three (3) days.
3. The Regional Director (Compliance) will issue an Order suspending the wholesaler's basic permit issued to McKenzie River Corporation for a period of three (3) days.

12-9-91 /s/ MINOTT WESSINGER
 Date Minott Wessinger, President
 McKenzie River Corporation

11/21/91 /s/ LARRY L. NICKELL
 Date Larry L. Nickell
 Attorney for the Government

* * * * *

[DEFENDANTS' EXHIBIT D]

[SEAL OMITTED]

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO
AND FIREARMS221 Main Street, 11th Floor
San Francisco, California 94105-1992

[JAN 10, 1992]

CC:SF:LLN
11242

REGISTERED MAIL — RRR

Mr. Minott Wessinger, President
McKenzie River Corporation
330 Townsend Street, Suite 3250
San Francisco, California 94107

Dear Mr. Wessinger:

Enclosed with this letter is my initial decision and order (ATF F 5000.5) suspending your Wholesaler's Basic Permit issued under the Federal Alcohol Administration Act, 27 U.S.C. § 201 *et seq.* This order accomplishes the agreed upon stipulated suspension of your permit.

The suspension is for a period of three days starting on February 3, 1992, and continuing through February 5, 1992. The privileges conferred by your permit allow your company to engage in the business of purchasing for resale at wholesale malt beverages and allow your company to receive, sell, offer or deliver for sale, contract to sell, or ship, directly or indirectly through an affiliate, malt beverages.

As we discussed in our meeting with you on October 29, 1991, during this three day suspension period, in practical terms, McKenzie River Corporation representatives may not solicit distributors to order malt beverages. Additionally, McKenzie River Corporation's affiliate, G. Heileman Brewing Company of Portland, Oregon, which acts as a distribution and collection agent for your company, may not fill orders for McKenzie River malt beverage products by shipping such products. The G. Heileman Brewing Company may receive orders for McKenzie River malt beverage products and produce and bottle such products. You should confer with G. Heileman Brewing Company and the distributors of McKenzie River malt beverage products to insure compliance with the terms of this suspension.

With the acceptance of your company's monetary offer in compromise for advertising violations committed in Pennsylvania, Washington, Ohio, Maryland, Oregon, New Jersey and Washington D.C., and the imposition of this suspension, this matter now comes to a close. We encourage you to contact us at any time with questions you may have regarding the federal regulation of malt beverage wholesaling activities and trust that the resolution of this case will enhance your company's commitment to compliance with such regulation.

If you have any questions regarding the suspension, please do not hesitate to contact us.

Sincerely yours,

/s/ THOMAS R. CROWE

for Harry J. Adler
Regional Director (Compliance)

Enclosures

cc: Paul Crotty, Esquire
Donovan Leisure Newton & Irvine
with enclosures

INFORMATION REFERRAL — FAA

SUBJECT (Name, Address, Permit Number (if applicable))

Columbia Distributing
2448 NW 28th
Portland, Or

2. PURPOSE OF REFERRAL

☒ INFORMATION REPORT
☐ COMPLAINT RESOLVED
WITHOUT INSPECTION

SOURCE (If anonymous, so state)

Bernard J. Kipp, Special Inspector Portland, POD

EVALUATION OF SOURCE

☒ RELIABLE ☐ FAIRLY RELIABLE ☐ UNRELIABLE ☐ UNKNOWN

EVALUATION OF INFORMATION

☒ CONFIRMED ☐ PROBABLY TRUE ☐ POSSIBLY TRUE ☐ IMPROBABLE ☐ UNABLE TO
ESTIMATE

EXPLANATION OF INFORMATION OR COMPLAINT

The attached sticker was placed on six packs of St. Ides malt beverage. This product is marketed in at least three western states (Oregon, Washington, and Calif.) and is produced by Blitz Weinhardt brewery. This sticker seems to be in direct conflict with 27 CFR 7.29 (f). Further, this matter has been discussed with St. Ides Brewing Co. previously. It appears the stickers are being placed on the packages by the wholesaler.



SUBMITTED BY (Name and Title)

Bernard J. Kipp, Special Insp.

8. OFFICE

Portland, Or.

9. DATE

5/18/90

REVIEWER'S COMMENTS

☐ NO COMMENT

[Defendants' Exhibit O, at p. 2]

00000002

00000000

REVIEWED BY (Name and Title)

12. OFFICE

13. DATE

INSTRUCTIONS - Please forward a copy with attachments to the Training Branch. Please see additional instructions on reverse.

PART I - IDENTIFICATION DATA									
COMPANY NAME, STREET ADDRESS, CITY, STATE, ZIP CODE					TYPE OF BUSINESS				
McKenzie River Corp.					Wholesaler				
330 Townsend Street					A/O				
San Francisco, CA 94107					San Francisco				
					COMPLAINT				
					<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO				
AFFECTED REGIONS					SOURCE				
N A					Pabst Brewing Co.				
FORM DATE									
10/9/90									
EVALUATION OF SOURCE (Check one)									
<input checked="" type="checkbox"/> RELIABLE <input type="checkbox"/> FAIRLY RELIABLE <input type="checkbox"/> UNRELIABLE <input type="checkbox"/> UNKNOWN									
EVALUATION OF INFORMATION (Check one)									
<input type="checkbox"/> CONFIRMED <input checked="" type="checkbox"/> PROBABLY TRUE <input type="checkbox"/> POSSIBLY TRUE <input type="checkbox"/> IMPROBABLE <input type="checkbox"/> UNABLE TO ESTIMATE									
PRODUCTS PROMOTED					PRODUCTS EXCLUDED				
St. Ides Malt Beverage									
KEYWORDS					LABELING				
<input type="checkbox"/> EXCLUSIVE OUTLET <input type="checkbox"/> TIED HOUSE <input checked="" type="checkbox"/> ADVERTISING					<input type="checkbox"/> FRAUD				
<input type="checkbox"/> CONSIGNMENT SALES <input type="checkbox"/> COMMERCIAL BRIBERY									
SUBMITTED BY (Name of Inspector/Specialist)					SPECIALIST				
Bernard J. Kipp									
ASSOCIATES									

PART II - DESCRIPTIVE DATA

DESCRIPTION

The attached correspondence indicates that McKenzie River Corp. has been using the attached advertisements which contain specific reference to alcoholic strength in violation of 27 CFR 7.29(F). The ads (Attachment #1) were distributed in the New York Metropolitan Area recently. These same ads were distributed in California in 1988 until Mr. Wessinger (Pres. of McKenzie River) was contacted by ATF and agreed to discontinue their use. Accord to the letters dated 9/20/90 & 9/27/90 (Attachments 2 & 3) has agreed to stop using them in New York however he may use them elsewhere.

PART III - RECOMMENDATION DATA		
REVIEWED BY	PRIORITY	
INVESTIGATION RECOMMENDED BY REVIEWER	INVESTIGATION ASSIGNED BY SUPERVISOR	
<input type="checkbox"/> YES <input type="checkbox"/> NO	<input type="checkbox"/> YES <input type="checkbox"/> NO	
COMMENTS		



<input type="checkbox"/> YES <input type="checkbox"/> NO	LICS SYSTEM REFERENCE NUMBER
PREVIOUS EDITION IS OBSOLETE	00000000

[Defendants' Exhibit P, at p. 3]

[Logo of Pabst Brewing Company]

100 Shoreline Hwy • Bldg. B, Suite 395 •
Mill Valley, CA 94941

September 19, 1990

Mr. Jon Johnson
McKenzie River Corp.
330 Townsend Street
San Francisco, CA 94107

Re: St. Ides Malt Liquor Advertisements

Dear Mr. Johnson:

It has come to our attention that you are engaging in what we believe to be deceptive and misleading advertising in the New York metropolitan area with regard to your St. Ides Malt Liquor. As indicated by the attached, you are representing to the public that St. Ides Malt Liquor is a product of the Pabst Brewing Company, manufacturers and holders of the trademark for Olde English 800 Malt Liquor. As this company has absolutely no connection whatsoever with St. Ides, we ask that you forthwith cease and desist from further advertising activities suggesting a connection between our company and your product.

Very truly yours,

/s/ EUGENE J. TOLER

Eugene J. Toler
Corporate Legal Counsel

EJT:lj
Enclosure

cc: Lutz E. Issleib
William M. Bitting, Esq.
Barry Bumgarner
Mr. Bernard Kipp, BATF – Portland, Oregon
Bureau of Alcohol, Tobacco & Firearms,
San Francisco, CA
Federal Trade Commission
New York State Liquor Authority

G7-185



ST IDES™

PREMIUM MALT LIQUOR



To Order
Call Toll Free
Manhattan Beer Distributors
1-800-233-7462

St. Ides - The New #1

1. *Strongest* Malt Liquor in America. (6.5% Alcohol/Wt.)
2. *Smoothest/Best Tasting* Malt Liquor in America - Gold Medal Winner, Great American Beer Festival VIII.
3. From the same people who brought you Olde English 800.

Pricing

Price	\$14.55	\$14.95
Deposit	\$ 1.20	\$ 0.70
Total Complete	\$15.75	\$15.65

Support

1. Advertising: T.V. and Radio (KISS 98.7FM & WBLS 107.5FM)
2. P.O.S (Posters, Shelf Strips, Cold Box Stickers)

[Defendants' Exhibit P, at p. 4]

00000004

00000284

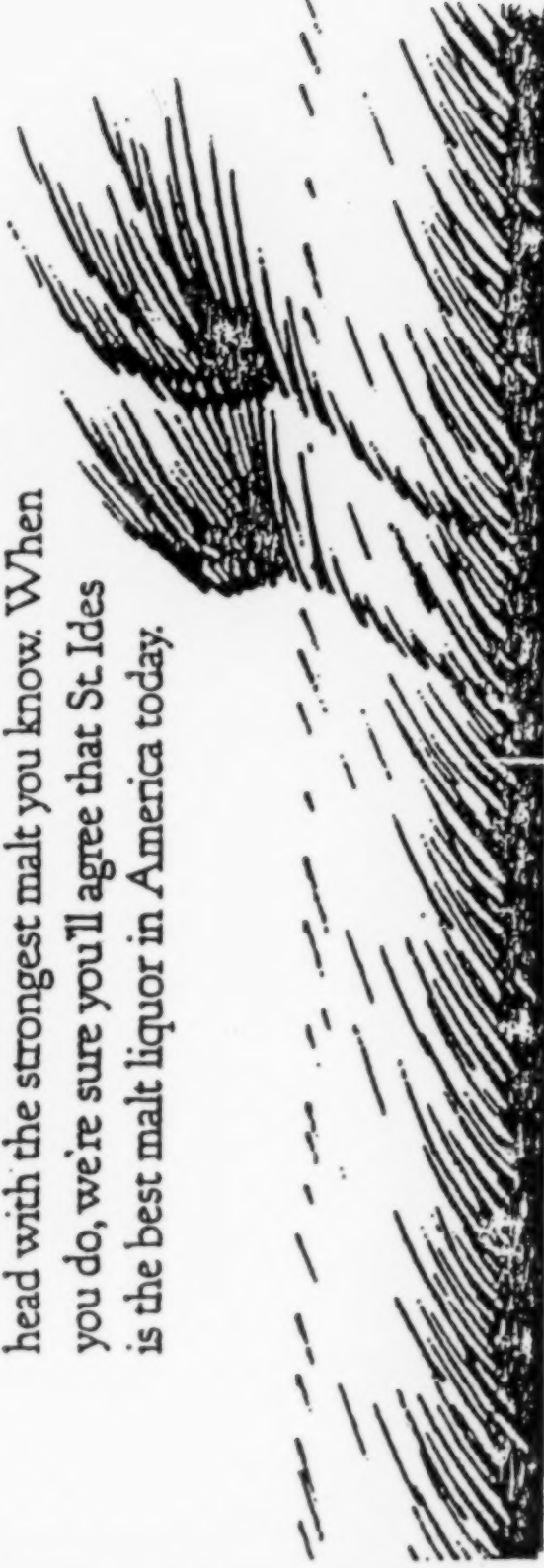
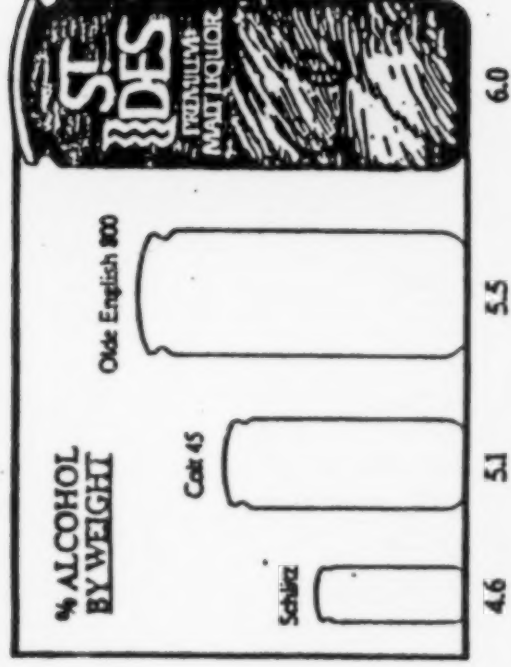
THE ST. IDES STORY.

St. Ides is the first real breakthrough in malt liquors since 1965. It's brewed by the people who first brought you Olde English 800, only now we've raised the stakes. St. Ides is now without exception—the strongest malt brewed in America.

But what's truly amazing about St. Ides is taste.

Usually when a malt liquor is exceptionally strong, it tastes really harsh. St. Ides, however, is made according to a special, secret recipe from the Caribbean that makes it taste unbelievably smooth—as smooth as an expensive imported beer.

But don't just take our word for it. Compare St. Ides head to head with the strongest malt you know. When you do, we're sure you'll agree that St. Ides is the best malt liquor in America today.



[Defendants' Exhibit P, at p. 6]

00000006

00000286

STIDES		% ALCOHOL BY WEIGHT
Olde English 800		5.5
Colt 45		5.1
Schlitz		4.6

STIDES
PREMIUM MALT LIQUOR

THE
STRONGEST
MALT MONEY
CAN BUY.



[Defendants' Exhibit P, at p. 7]

00000007

00000287

[Defendants' Exhibit Q, at p. 1]

[FEB 6, 1989]

Eugene J. Toler
Corporate Legal Counsel
Pabst Brewing Company
P.O. Box 992
Corte Madera, California 94925

Dear Mr. Toler:

This is in reference to your letter dated December 21, 1988, regarding an advertisement for St. Ides Malt Liquor. We apologize for taking an undue amount of time in responding to your letter.

We have contacted the McKenzie River Corporation regarding this matter and will take whatever action necessary to assure compliance with the Federal Alcohol Administration Act.

Thank you for bringing this matter to our attention and if we can be of further assistance, please feel free to contact us.

Sincerely yours,

Jerry Bowerman
Assistant Chief, Product Compliance Branch

[Defendants' Exhibit Q, at p. 2]

[Logo Omitted]

PABST BREWING COMPANY
P.O. BOX 992 • CORTE MADERA,
CALIFORNIA 94925

December 21, 1988

Mr. P. Orozco
Bureau of Alcohol, Tobacco & Firearms
221 Main Street, Eleventh Floor
San Francisco, CA 94105

Re: St. Ides Premium Malt Liquor

Dear Mr. Orozco:

This has further reference to my letter to you of October 28, 1988 regarding the above subject (copy enclosed). We have yet to receive your formal response to our complaint regarding the advertising practices of St. Ides wherein they list the alcoholic content of not only their product but others as well.

I enclose a copy of another advertisement for this product which was found in a local retail establishment this past week. It is obvious that St. Ides does not intend to discontinue this advertising which we had been under the impression was improper and illegal.

We would appreciate the Bureau's review of the en-

closed materials and advice as to whether you believe the advertising is improper.

Very truly yours,

/s/ GENE TOLER

Eugene J. Toler
Corporate Legal Counsel

EJT:lj
Enclosures

cc: Lutz E. Issleib

GT8-395

* * * * *

THE ST. IDES STORY.

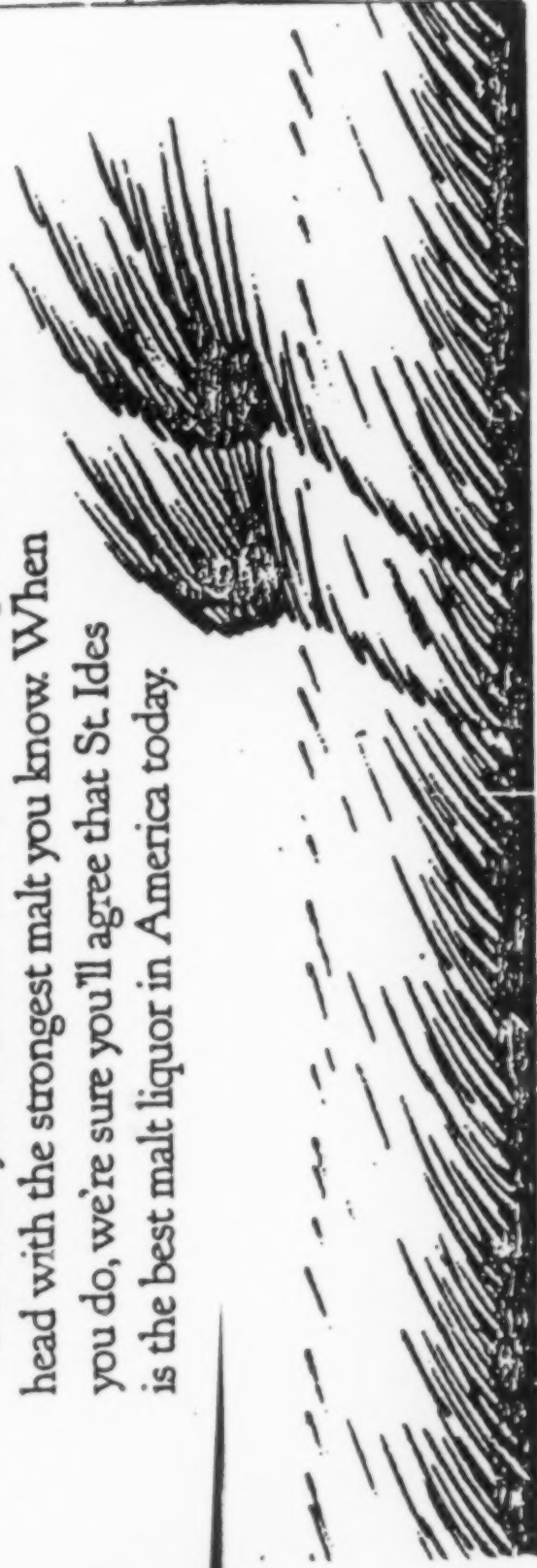
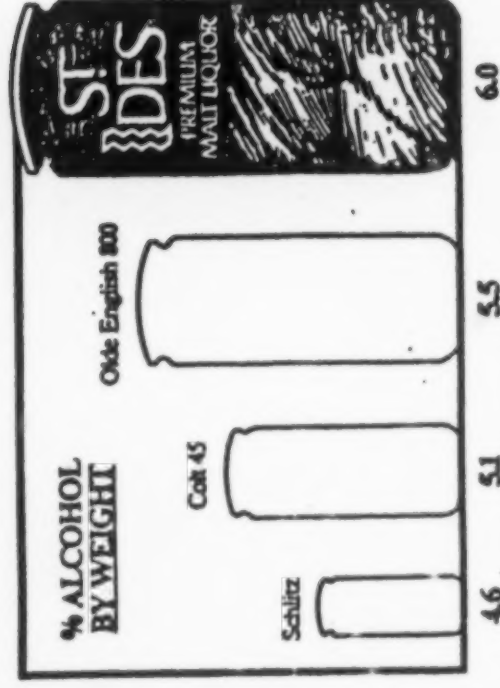
St. Ides is the first real breakthrough in malt liquors since 1965. It's brewed by the people who first brought you Olde English 800, only now we've raised the stakes. St. Ides is now without exception—the strongest malt brewed in America.

But what's truly amazing about St. Ides is taste.

Usually when a malt liquor is exceptionally strong, it tastes really harsh. St. Ides,

however, is made according to a special, secret recipe from the Caribbean that makes it taste unbelievably smooth—as smooth as an expensive imported beer.

But don't just take our word for it. Compare St. Ides head to head with the strongest malt you know. When you do, we're sure you'll agree that St. Ides is the best malt liquor in America today.



[Defendants' Exhibit Q, at p. 3]

00000003
00000066

[Defendants' Exhibit T, at p. 10]

[Logo Omitted]

THE STROH BREWERY COMPANY
100 RIVER PLACE
DETROIT, MICHIGAN 48207 — [Illegible]
[Illegible]

September 28, 1988

Mr. Daniel Black
Chief of Industrial Compliance Division
Department of Treasury
Bureau of Alcohol, Tobacco and firearms
Washington, DC 20226

Dear Mr. Black:

Attached please find an ad that appeared in the August, 1988 edition of the "Beverage Beacon/Ledger". This publication is distributed in the State of California. This advertisement of St. Ides makes suggestions as to the strength of the product in that it indicates that it is the #1 strongest malt liquor.

We have contacted the State of California regarding this matter and they have informed us that they have no statutes to prohibit this type of advertising unless it can be proved that the ads are false or misleading.

It is our feeling that this type of overt reference to extreme alcoholic strength is potentially damaging to the malt beverage industry.

We are curious to see if any action will be forthcoming from the BATF.

Sincerely,

/s/ HENRY M. GOETZ

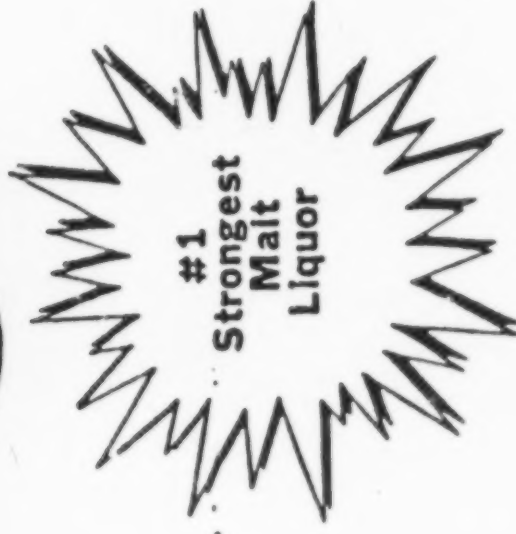
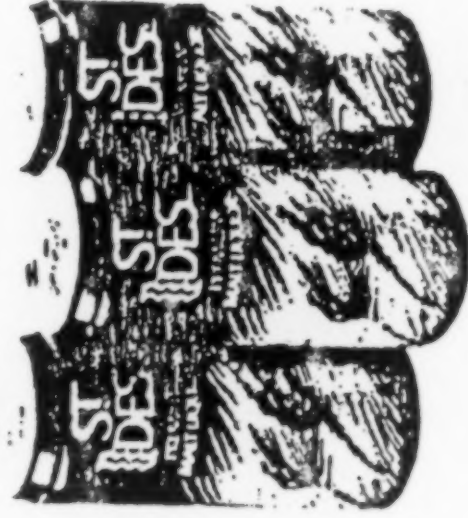
Henry M. Goetz

National Director of State Affairs

HMG/AMD/jmk

The McKenzie River Corporation®
Is Proud To Introduce

**ST
IDES**



**PREMIUM
MALT LIQUEUR**

**To The
Southern California Area**

**Interested Distributors Call
(213) 639-5497**

**IT WILL
BLOW YOU AWAY.**



STEVE MCQUEEN
Regional Sales Manager

[Defendants' Exhibit T, at p.11]

00000331
00000011

[Defendants' Exhibit AH, at p. 1]

[Bureau of Alcohol, Tobacco and Firearms]

[JUN 30, 1986]

C:I:P:JW
5130/1869

Mr. Donald S. McDonald
Anheuser-Busch Companies
One Busch Place
St. Louis, Missouri 63118-1852

Dear Mr. McDonald:

Thank you for your letter of May 29, 1986, regarding several cards found at various retail outlets which contain comparisons of alcohol content for several brands of malt beverages. In your letter you indicated that several Coors wholesalers and possible Coors employees are distributing the cards.

We appreciate you bringing this to our attention. We are looking into this matter as the distribution of such cards is a possible violation of the Federal Alcohol Administration Act.

If you have any further questions, please feel free to contact us.

Sincerely yours,
Norris L. Alford
Chief, Product Compliance Branch

[Defendants' Exhibit AH, at p. 2]

[Logo Omitted]

ANHEUSER-BUSCH COMPANIES

May 29, 1986

Mr. William T. Drake
Deputy Director
Bureau of Alcohol, Tobacco & Firearms
12th & Pennsylvania Avenues, N.W.
Washington, D.C. 20226

Re: Coors Advertising

Dear Bill:

The attached copies of cards have been picked up by Anheuser-Busch in various retail outlets around the country. We understand that various Coors wholesalers and perhaps Coors employees are distributing these cards.

I believe that the cards constitute a violation of the FAA Act which precludes alcohol content labeling and advertising unless required by state law. Of interest is the attached statement of the Ways and Means Committee on July 17, 1935 when the FAA Act was passed, which shows that Congress feared just this kind of advertising.

Anheuser-Busch would request that you investigate the matter and have the practice stopped if you agree that it is a violation of the law.

Very truly yours,

/s/ D. S. McDONALD
Donald S. McDonald

PRODUCT	ALCOHOLIC CONTENT
COORS LIGHT	3.29%
BUD LIGHT	2.75%
MILLER LITE	3.25%
STROH'S LITE	3.37%

#1

PRODUCT	ALCOHOLIC CONTENT
COORS	3.74%
BUD	3.66%
MILLER	3.56%
STROH'S	3.48%

PRODUCT	ALCOHOLIC CONTENT
COORS LIGHT	3.29%
BUD LIGHT	2.75%
MILLER LITE	3.25%

#2

PRODUCT	ALCOHOLIC CONTENT
COORS EXTRA GOLD	3.85%
BUD	3.66%
MILLER	3.56%
COORS	3.74%

[Defendants' Exhibit AH, at p. 31]

00000133

[DEFENDANTS' EXHIBIT AJ]

[BUREAU OF ALCOHOL, TOBACCO & FIREARMS]

[AUGUST 1, 1991]

C:I:S:KTF

5190

Mr. Charles W. Schmid
Senior Vice President, Marketing
Miller Brewing Company
3939 West Highland Boulevard
Milwaukee, WI 53208

Dear Mr. Schmid:

It has recently come to our attention that your 1991 point-of-sale materials for "Lowenbrau" malt beverage products contains the word "strong" and is used to describe the products. In addition, it is our understanding that your television commercials for these same products also contains several references wherein the word "strong" is also used to describe the products.

Pursuant to 27 U.S.C. Section 205(f), it is unlawful for a brewer to publish or cause to be published in any newspaper, periodical or other publication, or by any sign or outdoor advertisement or to disseminate or to cause to be disseminated by broadcast any advertisement which contains statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages. The regulation at 27 C.F.R. Section 7.54(c) specifically states that malt beverage advertisements shall not contain the words "strong," "high test," or any similar words or statements likely to be considered as statements of alcohol content, except where required by State law.

In addition, pursuant to section 205(f) and the regulation at 27 C.F.R. Section 7.54(a), malt beverage advertisements shall not contain any statement that is false or untrue in any material particular, or that, irrespective of falsity, directly or indirectly, or by ambiguity, omission, or inference, or by the addition of irrelevant scientific, or technical matter, tends to create a misleading impression.

We have determined that the 1991 point-of-sale materials for Lowenbrau malt beverage products and the television commercial for these products are in violation of the above provisions. In our view, the word "Strong" in these advertisements is a representation of alcoholic content or strength or are likely to be considered as such by the consumer. Furthermore, we believe that your use of the word "Strong" when viewed in connection with the advertisements' graphics, is misleading since it conveys the erroneous impression that use of the product is conducive to physical strength or prowess.

Therefore, we are advising your company to withdraw within ten (10) days from receipt of this letter the above advertisements and any ads with similar wording from radio or television broadcasting or any other means of circulation. In addition, we request that you advise us of the steps that have been taken by your company to stop these advertisements as well as the steps that you will take to prevent any recurrence of such advertising.

We encourage your voluntary cooperation in withdrawing the "Lowenbrau Strong Character" advertisements and any advertisements which contain the word "Strong" or any similar words or statements.

Sincerely yours,

[illegible]

* * * * *

[SEAL OMITTED]

MILLER BREWING COMPANY
3939 WEST HIGHLAND BOULEVARD
MILWAUKEE, WISCONSIN 53201-0482 •
(414) 931-2000

Mr. Thomas J. Skora
Chief, Market Compliance Branch
Bureau of Alcohol, Tobacco and Firearms
650 Massachusetts Avenue, N.W.
Washington, D.C. 20226

Dear Tom:

Re: Lowenbrau "Strong Character" Campaign

This letter will confirm our discussions on August 22, 1991 concerning the termination of the Lowenbrau "strong character" campaign by Miller. As pointed out, Miller is in the process of developing a replacement campaign for Lowenbrau. Based on a phased in introduction of the new campaign, all television and radio commercials, as well as all outdoor advertising media, will cease utilization of the "strong character" reference by December 31, 1991.

In addition, no lithograph or point of sale referencing "strong character" will be shipped by Miller to any distributor after December 15, 1991.

As we mentioned, it was never the intention of Miller to use the word strong as any kind of direct or indirect reference to the alcohol content of Lowenbrau which, as you may well be aware, falls into the normal alcohol content range of a super premium beer. Rather, strong was used in conjunction with the word character; a word the average beer drinker utilizes in conjunction with an adjective to describe or compare beers. Evidence of our intent is

demonstrated by our use of the "BAUHAUS" style of art utilized to enhance Lowenbrau's German heritage and character.

Be that as it may, we understand the position being taken by the BATF in light of current attention being given to any possible reference to the alcoholic strength of a malt beverage product. In accordance with that understanding, Miller will follow the above schedule in the termination of the "strong character" campaign.

Very truly yours,

/s/ DANIEL P. DOCKERY

Daniel P. Dockery
Associate General Counsel
and Assistant Secretary

DPD/eat

* * * * *

IT'S THE PROFIT!

[Defendants' Exhibit AW, at p. 104]

One of the highest profit items on the shelf

More emphasis on taste—its smooth, mellow taste brewed for relatively high alcohol content (important to the Ethnic market!)

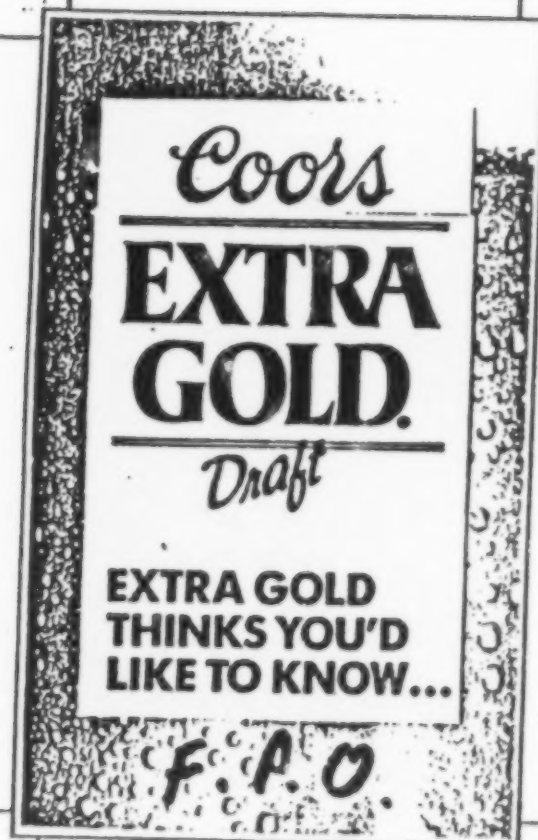
Strongly supported with powerful media advertising and point of sale in all major Ethnic markets



Prestige and value for the consumer
Full-bodied, smooth, mellow, and the power of
this 22 quart
Z. Flint beer

PROFIT PLANNER

A. Cost:	\$ _____ per case	D. Est. Sales	\$ _____ per case
B. Price To Consumer:	\$ _____ per case	for period:	
C. Gross Margin:	\$ _____ per case	E. Total Gross Margin for period:	\$ _____ per case
	(B - A)		(C x D)
			00000010



PRODUCT	ALCOHOL CONTENT % BY VOLUME
Extra Gold	4.94
Budweiser	4.79
Miller Genuine Draft	4.68
Miller High Life	4.65
Stroh's	4.48

© 1990 Coors Brewing Company, Golden, Colorado 80401 • 8966

DEFENDANT'S
 EXHIBIT
 BB
 87-2-977

C0239

Waller Card

Front Size 2 1/8 x 3 1/2 50° K966



ST. IDES
PREMIUM MALT LIQUEUR

ADVERTISING

The St. Ides Marketing plan will be spearheaded by a strong and memorable advertising program which will be seen and heard throughout the Bay Area, beginning June 29th.

POWERFUL CREATIVE

- o The objective of the campaign will be to position St. Ides as the contemporary, premium quality malt, incomparably smooth in taste while unmatched in strength.
- o "Come to the eye of the Storm" will be the theme of the advertising, providing a distinctive and powerful image for the brand and a dramatic symbol of the product's potency.
- o The campaign will be executed in a pool of breakthrough radio spots with exciting musical themes and evocative "Eye of the Storm" imagery.
- o A series of striking outdoor posters and transit signs will also be employed to reinforce the radio campaign and firmly establish brand identification.

BREAK THROUGH LEVELS

- o St. Ides advertising will run at aggressive levels throughout the year, and will include a heavy weight introductory period designed to generate immediate awareness and trial.
- o Spending in the Bay Area will be in excess of \$250,000 on an annual basis.
- o Levels will be competitive with the highest spending national malt liquor brands.
- o Goal to reach 100% of the target audience (Men 21-35) with an average frequency of 10 times in the first month.
- o Highlights of the plan are as follows:

RADIO

- o 250 GRP's per week against target (Men 21-35)
- o Over 7000 cumulative GRP's over 12 months
- o Average of 15 sixty second spots daily, 75 spots weekly
- o Concentrated in key day parts: Wednesday through Sunday, 3:00 - 8:00 pm
- o Average 60% Reach with 5.0 Frequency on a weekly basis
- o Bay Area's top rated stations: KSOL, KDIA & KBLX

OUTDOOR

- o 8 and 30 sheet postings throughout Bay Area
- o #75 showing in key target areas
- o Supplemental transit postings in Oakland and San Francisco
- o Average of 40 postings per month across the Bay Area
- o Average of 70 Reach with 2.0 Frequency per month
- o Quality positions keyed to target account locations

DEFENDANT'S
EXHIBIT
BT
87-2-977

[DEFENDANTS' EXHIBIT BZ, at p.2]

Colt 45 Focus Groups
New York, Philadelphia
Key Observations

Malt Liquor

- Consumers drink Malt Liquor to escape. They are very up front about admitting that “you drink malt to get high”
- Malt Liquor (particularly Colt 45) is a party drink, — Friday night having fun with the boys either at home or at the local bar.

Brands

- *Colt 45* is a terrific brand that with greater exposure will get stronger.
 - **Malt Liquor of choice for the majority of focus group participates — Passionate response
 - **Billy D has raised its status from the street corner to homes and bars
 - **Participants believed it helps them have fun. “It gets me there quicker.”
 - **Considered to have a kick but is smooth and lets you maintain some degree of control
 - **Price is not an issue
- *Olde English*
 - **Owns a clearly defined position as the strongest Malt Liquor — “I drink it when I want something to put me against the wall.”
- *Schlitz Malt Liquor*
 - **Remembered for the bull
 - **Considered smooth by some, tired and old by others
 - **Appears vulnerable but we probably need to speak with consumers in a Schlitz core market to be sure

[DEFENDANTS' EXHIBIT CA]

HIGH ALCOHOL MALT LIQUOR
POSITIONING STATEMENT

To malt liquor drinkers, aged 21-34, who want to be viewed as the master of *any* situation, “Power Master” is the one malt liquor that combines the alcohol that they want with a smooth, clean taste that is never harsh when it goes down.

The reasons why are:

1. “Power Master” is the most powerful malt liquor.
2. “Power Master” is “Cool Brewed” to avoid the harsh taste that you get from so many other malt liquors.
3. “Power Master” is brewed by Colt 45 (if applicable) so you are assured that it is a high quality product.

The attitude surrounding this product and its advertising will be that of extreme power. The product delivers. The man who drinks Power Master is a leader who exerts significant control over those around him.

ALTERNATIVE NAMES

Night Star
 Colt 45 Extra

[DEFENDANTS' EXHIBIT CD]

DELLA FEMINA MCNAMEE, INC.
350 HUDSON STREET, NEW YORK, NY 10014
212-886-4100. TELEX 428985. FAX 212-886-4415

MARY E. HALL
SENIOR VICE PRESIDENT
DIRECTOR OF RESEARCH

October 25, 1990

Mr. David G. Whalen
Vice President, Business Development
G. Heileman Brewing Co., Inc.
10 South Wacker Drive, Suite 3200
Chicago, IL 60606

Dear Dave,

This forwards Karen Montague's report on the High Alcohol one-on-ones. It differs from our conclusions to some degree by emphasizing the benefits of a Colt 45 position and neglecting the benefits of a more "macho" position. I believe this is because we ourselves have placed more importance on communicating the distinction of the high alcohol aspect of this brand as different from other malt liquor products. I continue to consider this a necessary task of the position and to think that we must identify the effect of the Colt 45 name.

Please call if you have any questions.

Best regards,

/s/ [illegible]

Mary Hall

cc: Bruce Carlisle

Hugh Nelson (G. Heileman)

David Harris (Lockhart & Pettus)

attachment

MEH:ccf

[DEFENDANTS' EXHIBIT CD]

* * * * *

Malt Liquor Advertising Evaluation Among Black Consumers

BACKGROUND

Colt 45 Malt Liquor, the flagship brand of G. Heileman, has been experiencing reduced volume. This situation is believed to be the result of competitive pressures in the form of aggressive pricing coupled with a number of new entries in the malt liquor category. In response G. Heileman is considering introducing a new malt liquor which in combination with Colt 45, will re-establish positive growth with the key user of malt liquor — Black males.

Della Femina, G. Heileman's advertising agency, is in the midst of developing advertising executions in support of this new brand entry. In so doing, the agency has clustered executional options around two distinct creative directions. These are:

- Executions whose central theme is that of a "line extension" to the base Colt 45 franchise. These executions use Colt 45 in the new product brand name and are predicated on positioning the new product as a "stronger/higher alcohol content" version of the parent brand.
- Executions whose central theme is the introduction of a new malt liquor which is "stronger/higher" in alcohol content than current brands on the market. These executions do not tie themselves to the Colt 45 base franchise and are positioned as "totally new" product entries.

Before a final decision on the creative direction for this new product can be made, Della Femina requires con-

sumer feedback from the target audience. This information is to provide input on the most impactful creative and copy direction of the new brand's advertising. With these goals in mind, this document represents the key findings from qualitative research conducted among Black male malt liquor drinkers.

* * * * *

SUMMARY OF FINDINGS

General Usage

- Most respondents across all markets were Colt 45 favorite brand drinkers, with the next largest group being Schlitz Malt liquor drinkers.
- Regardless of the brand, "smooth taste with no after-taste" and a malt with "more of a kick than beer" were the main features respondents liked about their brand. In general, Colt 45 brand drinkers gave more importance to the alcohol effect.

Reactions to Advertising Concepts

- Across all markets, the Colt 45 ads received the highest scores. The principal reasons were the concepts gave more information about the product than the other executions coupled with respondents' satisfaction and familiarity with the brand.
- Overall, seeing the Colt 45 name provided reassurance to many, even those who were not franchise drinkers, because it had been well-advertised and supported over the years.
- Of the ads that did not use the Colt 45 name, *Nightstar* showed the most promise as a viable concept and name for a new malt liquor. The success of *Nightstar* was due

primarily to the use of jazz which was associated with being "laid back", "coolin' out" and a "nightclub setting" all of which were perceived to go hand-in-hand with a malt liquor.

- With the exception of *Nightstar*, respondents seemed to prefer ads that spoke more about the product than those that talked about the image of the user. These included: Colt 45 Gold, Colt 45 Extra, and Colt Special Dry. Culprits of "too much" imagery were: *Ice Man*, *Apollo*, and *Power Master*.
- Brands which tended to communicate that the product had more alcohol and "more kick" on strictly a name basis were *Thunder*, *Wild Horse*, and *Power Master*. Interestingly, respondents viewed the product claim of "more alcohol" as appealing yet names which, on their face, suggested that it was a very potent malt were perceived to also force one out of control which was viewed as a negative.

* * * * *

[Defendants' Exhibit CE, at p. 5]

DELLA FEMINA McNAMEE, INC.

CREATIVE PLAN

CLIENT/BRAND: G. Heileman Brewing Co./Colt 45

ASSIGNMENT: _____

TODAY'S INTERNAL CLIENT
DATE: _____ REVIEW: _____ PRESENTATION: _____

WHO IS THE TARGET?

Black males LDA to 34. They reside in urban areas, are very knowledgeable about the trends and "in" things happening in their environment. The respect of their peers is important to them. They primarily drink malt liquor for the quick hit the product provides. Colt 45 is also used in social occasions to help stimulate conversation and create a party atmosphere.

WHAT DO THEY BELIEVE NOW?

That Colt 45 is a smooth tasting malt liquor for people who like to have a good time. Colt 45 delivers the same kick as other malt liquors but has superior product image and taste which dignifies the user.

WHAT DO WE WANT THEM TO BELIEVE?

More of what they currently believe but the advertising must increase the perception that Colt 45 is *the* premium malt liquor for today's young Black men. Colt 45 should be presented as the class act of malt liquors.

WHAT DO WE SAY TO CONVINCE THEM?

- Nothing is smoother than Colt 45
- The right people drink Colt 45 in the hippest situations
- Imply that Colt 45 has the desired kick

WHAT SUPPORTS OUR CLAIM?

The claims are generic to malt liquors and our consumers are very knowledgeable about the segment. What's important is how the commercial execution supports the premium, contemporary image of Colt 45.

* * * * *

[Defendants' Exhibit CII]

COLT 45 MALT LIQUOR
RESEARCH REVIEW
1983-1989

Prepared for: G. Heileman Brewing Co.
Prepared by: W.B. Doner & Company
Date: February 27, 1990

* * * * *

BRAND PERCEPTIONS/IMAGERY

I. *PERCEPTIONS ABOUT MALT LIQUOR*

Category users claim that the primary defining characteristic of the malt liquor category is perceived alcohol content or strength of the alcoholic effect.

- What differentiates malt liquors for most drinkers is the perceived alcoholic potency.
 - Malt liquor drinkers neither know nor care about differentiating malt liquors on the basis of ingredients or brewing process.
 - Most people group malt liquor brands together and distinguish them from most brands of beer.

(C)

* * * * *

Malt liquor drinkers select malt liquor rather than beer when intoxication is desired, appropriate or acceptable.

- For many, that means malt liquor is drunk more often at home, where "loss of control" is acceptable.

- Malt liquor is drunk with particular sets of friends among whom drinking is one of the attractions for getting together.
- Ordering or drinking malt liquor signals to others the intent to "party" or get high.

* * * * *

[Defendants' Exhibit CL]

QUALITATIVE RESEARCH

conducted for

G. HEILEMAN BREWING CO., INC.

conducted by

NATIONAL ANALYSTS
A Division of Booz-Allen & Hamilton, Inc.

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* * * * *

THE MOST COMMON IMAGERY FOR *OLD ENGLISH* INVOLVES ALCOHOL POTENCY, BUT "ENGLISH" IMAGES ARE ALSO PRESENT

- Old English is widely believed to be the most potent of the popular malt liquors.
 - Many malt liquor drinkers respond positively to the idea of superior potency.
 - They like efficiency in "getting a buzz."
 - They like getting their money's worth in alcohol.
 - They enjoy associating themselves with the imagery of wildness and partying that alcohol potency suggests.
 - However, when potency image leads to associations with drunks and hard-drinking "kids," it can become negative for many malt liquor drinkers.
- "English" imagery sometimes emerges for the brand and sometimes coexists with the associations involving potency and unrestrained drinking.
 - Somewhat paradoxically, some of the English imagery is elegant or refined.
 - Sometimes the potency and English images merge or achieve some consistency:
 - With the perception that English beer is strong and potent
 - With such English images of power as knights or Henry VIII.

* * * * *

- In summary:
 - The commercials have powerful assets:
 - Move Colt 45 upscale and away from street corner associations
 - Invite and legitimize use by women
 - Evoke sexual motivations that can be interesting and appealing
 - The commercials also raise some problems:
 - Do not speak forcefully to the dominant category — motivation: potency and usually a degree of uninhibited self-indulgence and escape
 - Use staging that sometimes strains their credibility as being about malt liquor
 - Appeal too blatantly to sexual motivation for some more sophisticated malt liquor drinkers

* * * * *

[Defendants' Exhibit DA]

Modern Brewery Age Blue Book

* * * * *

[272] **PERMISSIBLE ALCOHOLIC CONTENT
FOR FERMENTED MALT BEVERAGES**

ALABAMA — Minimum 0.5% by volume. Maximum 4% by weight and 5% by volume.

ALASKA — Minimum 1% by volume.

ARIZONA — Minimum 0.5% by volume.

ARKANSAS — Maximum 5% by weight; (over 5%; higher licenses, lower tax).

CALIFORNIA — Minimum 0.5% by volume. Maximum 4% by weight for beer. Ale, etc., no maximum.

COLORADO — Minimum 0.5% weight; over 3.2% (malt liquor), higher licenses.

CONNECTICUT — Minimum 0.5% by volume.

DELAWARE — Minimum 0.5% by volume.

DISTRICT OF COLUMBIA — Minimum 0.5% by volume.

FLORIDA — All beer containing more than 6.243% of alcohol by volume (formerly, more than 5% by weight) will be considered "intoxicating liquors."

GEORGIA — Maximum 6% by volume.

HAWAII — Minimum 0.5% by volume.

IDAHO — Maximum 6% by weight; beer containing more than 4% alcohol by weight shall be considered and taxed as wine.

ILLINOIS—Local option may limit to 4% by weight. Minimum 0.5% by volume.

INDIANA—No limit.

IOWA—Minimum 0.5% by volume. Maximum 5% by weight; higher alcoholic content beer through state stores.

KANSAS—Maximum 3.2% by weight. Over 3.2% in liquor stores, in packages only.

KENTUCKY—Local option may limit to 3.2% by weight. Minimum 0.1% by volume.

LOUISIANA—Maximum 6% by volume; higher alcoholic content beer through liquor licensees. Dry areas 3.2% by weight.

MAINE—Minimum 0.5% by volume.

MARYLAND—Minimum 0.5% by volume.

MASSACHUSETTS—Maximum 12% by weight. Minimum 0.5% by volume.

MICHIGAN—Minimum 0.5% by volume.

MINNESOTA—0.2% by weight, over 3.2% higher licenses and tax; minimum 0.5% by volume.

MISSISSIPPI—Maximum 4% by weight.

MISSOURI—Maximum 3.2% by weight. "Malt liquor" (over 3.2%), 5% by weight, minimum 0.5% by volume.

MONTANA—Maximum 7% by weight, minimum 0.5% by volume.

NEBRASKA—No limit.

NEVADA—Minimum 0.5% by volume.

[273]

NEW HAMPSHIRE—"Beverage" and "cider": not less than 0.5% alcohol by volume—previously was 1% or more by volume minimum.

NEW JERSEY—Minimum 0.5% by volume.

NEW MEXICO—Minimum 0.5% by volume.

NEW YORK—Minimum 0.5% by volume.

NORTH CAROLINA—Maximum 6% by weight; minimum 0.5% by volume.

NORTH DAKOTA—Minimum 0.5% by volume.

OHIO—Maximum 6% weight; minimum 0.5% by weight.

OKLAHOMA—Maximum 3.2% by weight; over 3.2% in liquor stores, packages only. Minimum 0.5% by volume.

OREGON—Maximum 4% by weight for beer; 14% by volume for malt beverage other than beer. Minimum 0.5% by volume.

PENNSYLVANIA—Minimum 0.5% by weight.

RHODE ISLAND—Minimum 0.5% by volume.

SOUTH CAROLINA—Maximum 0.5% by weight.

SOUTH DAKOTA—Minimum 5% by weight. Maximum "low point beer" 3.2% weight; high point, 6% weight.

TENNESSEE—Maximum 5% by weight; over 5% higher licenses and tax.

TEXAS—Beer 4% by weight; "ale" or "malt liquor" over 4%, higher licenses and tax. Minimum 0.5% by volume.

UTAH—Maximum 3.2% by weight. Over 3.2 in state stores. Minimum 0.5% by volume.

VERMONT—Maximum 6% by volume. Higher alcoholic content beer through state stores. Minimum 1% by volume.

VIRGINIA—Minimum 0.5% by volume.

WASHINGTON—Maximum 8% by weight; higher alcoholic content through state stores. Minimum .5% by volume.

WEST VIRGINIA—Maximum 4.2% by weight; 6% by volume.

WISCONSIN—Maximum 5% by weight; (over 5%, higher licenses, same tax). Minimum .5% by volume.

WYOMING—Minimum .5% by volume.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 87-Z-977

ADOLPH COORS COMPANY, PLAINTIFF

v.

JAMES BAKER, IN HIS OFFICIAL CAPACITY AS SECRETARY OF
THE UNITED STATES DEPARTMENT OF THE TREASURY, AND
STEVE HIGGINS, IN HIS OFFICIAL CAPACITY AS DIRECTOR,
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
DEFENDANTS

[Filed Oct. 29, 1992]

DECLARATORY JUDGMENT AND INJUNCTION

This matter was tried on October 26, 1992, through October 28, 1992, before the Honorable Zita L. Weinshienk, Judge, presiding. After hearing the evidence and arguments, the Court made oral findings of fact and conclusions of law which are incorporated herein by reference as if fully set forth. Accordingly, it is

ORDERED that the Court declares, adjudges and decrees that the specific part of 27 U.S.C. § 205(e)(2), prohibiting statements of the alcoholic content in the labeling of malt beverages is an unconstitutional restraint on commercial speech in violation of the First Amendment of the Constitution of the United States. It is

FURTHER ORDERED that the Bureau of Alcohol, Tobacco and Firearms shall not enforce said statutory prohibition commencing November 9, 1992. It is

FURTHER ORDERED that defendants shall have a stay of execution until November 9, 1992.

DATED at Denver, Colorado, this 29th day of October, 1992.

BY THE COURT:

/s/ Zita L. Weinshienk

ZITA L. WEINSHIENK, Judge
United States District Court

Supreme Court of the United States

No. 93-1631

LLOYD BENTSEN, SECRETARY OF THE TREASURY, PETITIONER

v.

ADOLPH COORS COMPANY

ORDER ALLOWING CERTIORARI. Filed June 13, 1994.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

June 13, 1994

(6)
No. 92-1631

U.S. SUPREME COURT
FILED

AUG 5 1994

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

**LLOYD BENTSEN, SECRETARY OF THE TREASURY,
PETITIONER**

v.

COORS BREWING COMPANY

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

BRIEF FOR THE PETITIONER

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General

MICHAEL JAY SINGER

JOHN S. KOPPEL

Attorneys

*Department of Justice
Washington, D.C. 20530
(202) 514-3317*

BEST AVAILABLE COPY

QUESTION PRESENTED

Section 5(e)(2) of the Federal Alcohol Administration Act, 27 U.S.C. 205(e)(2), prohibits statements of alcohol content on the labels of malt-beverage containers unless such statements are required by state law. The question presented is whether that labeling restriction comports with the First Amendment.

II

PARTIES TO THE PROCEEDING

Petitioner, the defendant below, is the Secretary of the Treasury. The other defendant below was the Director of the Bureau of Alcohol, Tobacco and Firearms within the Department of the Treasury. Respondent is the Coors Brewing Company, which was substituted for the Adolph Coors Company, the plaintiff below, pursuant to this Court's order of August 2, 1994, granting respondent's motion for substitution. Also participating in the proceedings below were the Speaker and Bipartisan Leadership Group of the United States House of Representatives, which initially participated as defendants-intervenors but later withdrew from the case in order to allow defendants to be represented exclusively by the Department of Justice.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1631

LLOYD BENTSEN, SECRETARY OF THE TREASURY,
PETITIONER

v.

COORS BREWING COMPANY

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT*

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 2 F.3d 355. The prior opinion of the court of appeals (Pet. App. 10a-31a) is reported at 944 F.2d 1543.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 1993. A petition for rehearing was denied on December 1, 1993. Pet. App. 55a-56a. On February 22, 1994, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to and including March 31, 1994. On March 22, 1994, Justice Ginsburg further extended the time for filing a petition for a writ of certiorari to and including April 15, 1994, and the petition was filed on that date. The petition for a writ of certiorari was granted on June 13, 1994. Joint Appendix (J.A.)

363. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law * * * abridging the freedom of speech."

The Twenty-first Amendment to the United States Constitution provides in pertinent part:

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 5 of the Federal Alcohol Administration Act (FAAA), 27 U.S.C. 205, is reproduced at Pet. App. 57a-65a.

Section 7 of the FAAA, 27 U.S.C. 207, provides in pertinent part:

Any person violating any of the provisions of section * * * 205 of this title shall be guilty of a misdemeanor and upon conviction thereof be fined not more than \$1,000 for each offense.

The relevant portions of 27 C.F.R. 7.26, 7.29, and 7.54 are reproduced at Pet. App. 66a-72a.

STATEMENT

This case concerns the constitutionality of a portion of 27 U.S.C. 205(e)(2), a provision in the Federal Alcohol Administration Act (FAAA or Act), 27 U.S.C. 201 *et seq.* Section 205(e)(2) in relevant part prohibits statements of alcohol content on the labels of malt beverages, unless such statements are required by state law. Congress enacted the labeling restriction in Section 205(e)(2) to curb "strength wars" among brewers of malt beverages

such as the one that arose after Prohibition was repealed. The Tenth Circuit held that the labeling restriction violates the First Amendment. This Court granted certiorari to review that holding.

A. The Statutory And Regulatory Background

1. The FAAA, 27 U.S.C. 201 *et seq.*, was enacted "[i]n order effectively to regulate interstate and foreign commerce in distilled spirits, wine, and malt beverages, to enforce the twenty-first amendment, and to protect the revenue and enforce the postal laws with respect to distilled spirits, wine, and malt beverages." 27 U.S.C. 203.¹ To carry out those purposes, Section 2(a) of the Act created the Federal Alcohol Administration (FAA) as a division within the Department of the Treasury. FAAA, ch. 814, 49 Stat. 977 (1935), repealed by the Liquor Tax Administration Act, ch. 830, § 501(a), 49 Stat. 1964 (1936) (making FAA an independent establishment of the government). Sections 3 and 4 of the Act required certain participants in the alcoholic beverage industry (other than brewers) to obtain a permit from the Secretary of the Treasury. 49 Stat. 978-981 (current versions at 27 U.S.C. 203, 204). Section 5 of the Act proscribed certain types of "[u]nfair competition" and "unlawful practices." 49 Stat. 981-985 (current version at 27 U.S.C. 205). Violations of Section 5 were punishable as misdemeanors under Section 7, 49 Stat. 985-986 (current version at 27 U.S.C. 207), and by suspension or revocation of a permit under Section 4(d) and (e),

¹ See also *National Distributing Co. v. United States Treasury Dep't*, 626 F.2d 997, 1004 (D.C. Cir. 1980) (discussing history and purpose of FAAA); *Continental Distilling Corp. v. Shultz*, 472 F.2d 1367, 1369-1370 (D.C. Cir. 1972) (same); *William Jameson & Co. v. Morgenthau*, 25 F. Supp. 771, 774 (D.D.C. 1938) (three-judge court) (rejecting constitutional challenge to FAAA), vacated for lack of substantial federal question, 307 U.S. 171 (1939) (*per curiam*).

49 Stat. 979 (current versions at 27 U.S.C. 204(d) and (e)).²

This case involves a challenge to the portions of the Act codified as Section 205(e)(2) and Section 205(f)(2) of Title 27. Those provisions prohibit numerical and descriptive statements of alcohol content on the labels of malt-beverage containers and in advertisements for malt beverages.³ Section 205(e)(2) requires the containers of all alcoholic beverages to be labeled

in conformity with such regulations * * * [of the Secretary] (2) as will provide the consumer with adequate information as to the identity and quality of the products [and] the alcoholic content thereof

² Neither the FAAA nor any other federal statute restricts the amount of alcohol that malt beverages may contain. That matter has been left to the States, consistent with the long "history of state regulation of alcoholic beverages" and Congress's solicitude for the States' broad discretion in this area. See *Craig v. Boren*, 429 U.S. 190, 205-206 (1976); see also *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 107 n.10 (1980). In turn, many States restrict the alcohol content of malt beverages. See J.A. 357-360 (survey of state laws).

³ The term "malt beverage" is defined by statute (27 U.S.C. 211(a)(7)) and regulation (27 C.F.R. 7.10) as:

A beverage made by the alcoholic fermentation of an infusion or decoction, or combination of both, in potable brewing water, or malted barley with hops, or their parts, or their products, and with or without other malted cereals, and with or without the addition of unmalted or prepared cereals, other carbohydrates or products prepared therefrom, and with or without the addition of carbon dioxide, and with or without other wholesome products suitable for human food consumption.

Thus, the term "malt beverage" encompasses all types of what is commonly referred to as "beer," and hereafter we use the two terms interchangeably. For purposes of this case, however, it is important to distinguish the terms "malt beverage" and "malt liquor." While the term "malt beverage" includes "malt liquor," the latter term is not defined by the FAAA or regulations; rather, it is a term that has come to be used in the industry to refer to the type of beer with the highest alcohol content. See Pet. App. 7a n.4; J.A. 208.

(except that statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages are prohibited unless required by State law * * *).

27 U.S.C. 205(e)(2) (emphasis added). Section 205(f)(2) requires print and broadcast advertisements for all alcoholic beverages to be

in conformity with such regulations * * * [of the Secretary] (2) as will provide the consumer with adequate information as to the identity and quality of the products advertised [and] the alcoholic content thereof (except the [sic] statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages and wines are prohibited).

27 U.S.C. 205(f)(2) (emphasis added).

Both Sections 205(e)(2) and 205(f)(2) are designed to operate in a manner that is consistent with state law. The labeling restriction in Section 205(e)(2), by its terms, applies unless state law requires disclosure of alcohol content on malt-beverage labels. The advertising restriction in Section 205(f)(2) applies, by virtue of the penultimate paragraph of Section 205(f), only in States that adopt similar restrictions for beer that is wholly in intrastate commerce.⁴ Thus, a State may choose whether

⁴ The penultimate paragraph of Section 205(f) provides in pertinent part:

In the case of malt beverages, the provisions of this subsection and subsection (e) of this section shall apply to the labeling of malt beverages sold or shipped or delivered for shipment or otherwise introduced into or received in any State from any place outside thereof, or the advertising of malt beverages intended to be sold or shipped or delivered for shipment or otherwise introduced into or received in any State from any place outside thereof, only to the extent that the law of such State imposes similar requirements with respect to the labeling or advertising, as the case may be, of malt beverages not sold or shipped or delivered for shipment or otherwise introduced into or received in such State from any place outside thereof.

Although the penultimate paragraph of Section 205(f) refers to Section 205(e), ATF and its predecessors have long interpreted it

the federal labeling or advertising restriction will apply within its borders.

Implementing regulations prohibit the disclosure of alcohol content on malt-beverage labels, except where disclosure is required by state law (27 C.F.R. 7.26(a), 7.29(g)), and they prohibit the disclosure of alcohol content in print and broadcast beer advertising, to the extent that the State imposes similar advertising restrictions on beer that remains in the State (27 C.F.R. 7.50, 7.54(c)). The labeling restriction covers both numerical designations of alcohol content and descriptive terms suggestive of high alcohol content, such as "‘strong,’ ‘full strength,’ ‘extra strength,’ ‘high test,’ ‘high proof,’ [and] ‘full alcohol strength.’" 27 C.F.R. 7.54(c); 27 C.F.R. 7.29(f). The labeling restriction does not, however, preclude beer labels or advertising that identifies a beer as "low" or "reduced" alcohol, "non-alcoholic," or "alcohol-free," in accordance with the Secretary's definition of those terms. 27 C.F.R. 7.26(b)-(d); see also 27 C.F.R. 7.29(f), 7.54(c). The labeling restriction is enforced by regulations requiring the bottlers of malt beverages to obtain certificates of label approval from the Secretary (or to obtain exemptions from that requirement). 27 C.F.R. 7.40-7.42; see also 27 U.S.C. 205(e).

2. In enacting the FAAA, Congress prohibited statements of alcohol content in malt-beverage labeling and advertising in order to curb "strength wars" among brewers of the sort that arose in the wake of the repeal of Prohibition by the Twenty-first Amendment.

As discussed in the legislative history of the FAAA, the adoption of the Twenty-first Amendment "took place

not to require a State to enact its own malt-beverage labeling restriction in order for the federal malt-beverage labeling restriction to apply in that State. Instead, under the plain terms of Section 205(e) (2), the federal labeling restriction applies unless a State affirmatively requires disclosure of alcohol content on malt-beverage labels. See, e.g., Rev. Rul. 62-95, 1962-1 C.B. 362. Coors has noted that interpretation without challenging it. See 89-1203 Resp. C.A. Br. 16 n.16.

with unexpected speed." H.R. Rep. No. 1542, 74th Cong., 1st Sess. 3 (1935). The Amendment was proposed to the legislatures of the States by the Seventy-second Congress on February 20, 1933, and was ratified by the requisite number of States less than ten months later, on December 5, 1933. See *ibid.*; 76 Cong. Rec. 4565 (1933). Because Congress was not in session at that time, the President signed an executive order to fill the perceived regulatory vacuum by approving continued regulation of the alcoholic beverage industry under the voluntary code system that had been developed pursuant to the National Industrial Recovery Act (NIRA). Exec. Order No. 6474 (Dec. 4, 1933); see H.R. Rep. No. 1542, *supra*, at 3-4. According to the committee reports on the bill that became the FAAA, the Act "[i]n general * * * incorporates the greater part of the system * * * enforced by the Government under the codes." H.R. Rep. No. 1542, *supra*, at 4; S. Rep. No. 1215, 74th Cong., 1st Sess. 3 (1935). The Tenth Circuit accordingly recognized in its first decision in this case that the history of regulations adopted under the code system is relevant to interpretation of the Act. Pet. App. 17a n.4.

The regulations initially proposed by the Federal Alcohol Control Administration (FACA) pursuant to the executive order did not prohibit numerical statements of alcohol content in beer labeling or advertising. *Hearing Before the FACA With Reference to Proposed Regulations Relative to the Labeling of Products of the Brewing Industry* (Nov. 1, 1934) (*FACA Hearing*), Clerk's Record (CR) 15, at 3-4. Instead, the proposed regulations prohibited only descriptive statements such as "‘full strength,’ ‘extra strength,’ ‘high test,’ ‘high proof,’ [and] ‘prewar proof.’" *Id.* at 3. At the hearing on the proposed regulations, however, witnesses unanimously supported a broader prohibition that would bar even seemingly objective numerical designations of alcohol content. For example, the first witness at the hearing, George McCabe, counsel to the Brewers Code Authority, stated (*id.* at 7):

We would like a regulation of the F.A.C.A. which would outlaw any declaration of alcoholic content on labels for fermented malt liquors except in States where such a requirement is made by the State law. * * * [T]he alcoholic declaration has been productive of more deception than any one part of the label. Some brewers went haywire * * * and were trying to sell their beer on an alcohol basis, and they resorted, as you all know, to the use of all sorts of numbers and figures, numerals, to convey the impression that the beer contained an excessive amount of alcohol, which it did not contain.

Mr. McCabe then read a letter from a major brewer, which he described as "fairly expressive of the general sentiment of the industry," recommending that "all reference to alcoholic content * * * be eliminated from labeling [and] advertising," in light of the "trouble with this sort of thing during the past 18 months." *Id.* at 8. Other witnesses explained that, although "the legitimate brewer does not desire to sell his beer on the basis of alcohol," but rather "as a food product" (*id.* at 25), some brewers "seem[ed] to be of the opinion that to sell beer they should sell the public alcohol" (*id.* at 29). The latter brewers' practice of disclosing alcohol content led "legitimate" brewers to conclude that "in order to meet competition it was necessary to increase the alcoholic content of the[ir] beer." *Id.* at 59. The witnesses predicted that a prohibition on statements of alcohol content would "get * * * beer back to a low alcoholic content." *Id.* at 73; see also *id.* at 33 ("if you just write the alcoholic content off the label, you are going to have a lower alcoholic content beer than you are if you require the alcoholic content to be stated on the label"). The resulting regulation provided in relevant part that "[t]he alcoholic content and/or the percentage and quantity of the original extract shall not be stated unless required by State or Federal laws or regulations." *Regulations Relating to the*

Labeling of Domestic Products of the Brewing Industry § 9(a), at 4 (Mar. 1, 1935) (attached as appendix to *FACA Hearing*).⁵

The House committee report on the bill that became the FAAA expressed the judgment that "[m]alt beverages should not be sold on the basis of alcohol content." H.R. Rep. No. 1542, *supra*, at 12. It explained that "attempts to sell beer and other malt beverages on the basis of alcoholic content are attempts to take advantage of the ignorance of the consumer and of the psychology created by prohibition experiences." *Ibid.* The report found that "[l]egitimate members of the industry have suffered seriously from unfair competition resulting from labeling and advertising" that stated alcoholic content. *Ibid.* The report also found that "irrespective of th[e] falsity" of such statements, "their abuse has grown to such an extent since repeal that the prohibition of all such statements is in the interest of the consumer and the promotion of fair competition." *Id.* at 12-13. More broadly, the report concluded, based on "[e]xperience prior to prohibition," that the States "could not alone" protect their citizens from "unscrupulous advertising" and "deceptive labeling practices," due to "the diversity of their laws and the fact that practically all alcoholic beverage producers and large-scale distributors did an interstate business." *Id.* at 2-3.⁶

3. Labeling restrictions on malt beverages are currently in effect in all 50 States by virtue of either positive state law or acquiescence in the federal labeling restriction in Section 205(e)(2).

⁵ Regulation of the alcoholic-beverage industry continued under the code system until this Court struck down the NIRA in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). See *National Distributing Co.*, 626 F.2d at 1005; H.R. Rep. No. 1542, *supra*, at 3.

⁶ The Senate report similarly found that abusive "labeling or advertising" was one of the "serious social and political evils" that "were in large measure responsible for bringing on prohibition" and that "cannot be reached by the States." S. Rep. No. 1215, *supra*, at 6-7.

Twenty-one States and the District of Columbia prohibit statements of alcohol content on the labels of some or all types of malt beverages.⁷ Several States in this

⁷ Ala. Code § 28-3A-6(c) (1986) (requiring brewers to file federal certificates of label approval with the State); Ariz. Comp. Admin. R. & Regs. R4-15-220(6) (1990) (requiring compliance with federal labeling requirements); Conn. Agencies Regs. § 30-6-A35(m) (1976) (expressly incorporating federal labeling requirements as state law); Del. Alc. Bev. Cont. Comm. Regs. R. 13(b) (1991) (requiring compliance with federal labeling requirements); D.C. Mun. Regs. tit. 23, § 910 (1988) (incorporating federal labeling provisions in part); *Modern Brewery Age (Blue Book)* 267 (53d ed. 1993) (digest of alcohol labeling requirements for D.C.); Ill. Admin. Code tit. 11, § 100.70(b)(9) (1991) (no beer containers "shall have affixed thereto any label or statement showing the alcoholic content thereof"); Alc. Bev. Comm'n of Ind. Bull. 23 (Aug. 4, 1938) (malt-beverage labels may not indicate alcohol content by numerals or descriptive terms); Ky. Rev. Stat. Ann. § 244.520 (Bobbs-Merrill 1981) (malt-beverage labels may not "refer[] in any manner to the alcoholic strength"); Me. Rev. Stat. Ann. tit. 28-A, § 711(1)(A) (West 1988) (malt-beverage label may not "refer[] in any manner to the alcohol content"); Mich. Admin. Code r. 436.1611 (1989) (requiring compliance with federal labeling requirements); N.J. Admin. Code tit. 13, § 2-27.1 (1990) (requiring compliance with federal labeling requirements); N.Y. Alco. Bev. Cont. Law App. § 84.6(a) (McKinney 1987) (prohibiting disclosure of alcohol content on malt-beverage labels); Ohio Rev. Code Ann. § 4301.03(D) (Supp. 1993); Pa. Stat. Ann. tit. 47, § 4-493(7) (1969) (malt-beverage labels may not "in any manner refer[] to the alcoholic contents"); R.I. Liq. Cont. Admin. Regs. No. 17 (1992) (federal labeling requirements "will be enforced" by State); S.C. Code Ann. § 61-13-800 (Law. Co-op. 1990) (requiring compliance with federal labeling requirements); S.D. Codified Laws Ann. § 39-13-11 (1987) (compliance with federal labeling requirements deemed compliance with state law); *Modern Brewery Age, supra*, at 271 (indicating that South Dakota requires malt-beverage labels to state "Not over 3.2% alcohol by weight," apparently precluding other statements of alcohol content); Tex. Admin. Code tit. 16, § 45.79 (1991) ("[t]he alcoholic content * * * shall not be stated" on malt-beverage labels); Utah Admin. R. 96-1-3(3) (1991) (requiring compliance with federal labeling requirements); Va. Alc. Bev. Cont. Bd. Regs. § 5(A)(3) (1991) (requiring compliance with federal labeling requirements); cf. Va. Code Ann. § 4.1-103.8 (Michie 1993) (Virginia Board may by regulation

category expressly incorporate Section 205(e)(2) of the FAAA or its implementing regulations.⁸

In addition, 20 States have effectively adopted Section 205(e)(2)'s prohibition on alcohol content labeling by acquiescence—*i.e.*, by not invoking their authority under Section 205(e)(2) to require such statements on labels. See Rev. Rul. 62-95, 1962-1 C.B. 362.⁹

Finally, 10 States require an alcohol-content statement on labels of malt-beverage containers, but only with respect to malt beverages above or below a certain alcohol percentage.¹⁰

establish labeling requirements); W. Va. Non-Intox. Beer Comm'n Regs. § 176-1-3.1 (1990) ("[t]here shall not be any statement as to alcoholic content on the bottle and can label" of malt beverages); Wis. Admin. Code § 7.21 (Dep't of Revenue) (1991) (requiring compliance with federal labeling requirements).

⁸ See statutes and regulations cited in note 7, *supra*, for Alabama, Arizona, Connecticut, Delaware, Michigan, New Jersey, South Carolina, Utah, Virginia, and Wisconsin.

⁹ See *Modern Brewery Age, supra*, at 266-272, which indicates that the federal prohibition of malt-beverage alcohol content statements on labels is in effect, by virtue of the State's not requiring such statements, in 19 States: Alaska, Florida, Georgia, Hawaii, Iowa, Kentucky, Louisiana, Maryland, Massachusetts (with respect to malt beverages containing more than 3.2% alcohol by weight), Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Tennessee, Vermont, and Wyoming. Our research indicates that there are two additional States, Idaho and Washington, that have acquiesced in the federal prohibition, but that Kentucky has enacted its own statute prohibiting statements of alcohol content on malt-beverage containers, rather than simply acquiescing in the federal prohibition. See Ky. Rev. Stat. Ann. § 244.520 (Bobbs-Merrill 1981), cited in note 7, *supra*.

¹⁰ Ark. Alc. Bev. Cont. Div. Regs. § 2.17 (1991) (requiring malt beverages containing more than 5% alcohol by weight to be labeled as such); Cal. Code Regs. tit. 4, § 130 (1990) (prohibiting alcohol-content statements on labels of malt beverages containing more than 4% alcohol by weight); Colo. Code Regs. § 46-112.3.C (1993) (malt-beverage labels must indicate that alcohol content is not more than 3.2% by weight); Kan. Admin. Regs. §§ 14-7-2(c), 92-8-9a (1985) (malt-beverage labels must state "does

B. The Proceedings In This Case

1. In April 1987, the Adolph Coors Company applied to the Bureau of Alcohol, Tobacco and Firearms (ATF) within the Treasury Department for approval of proposed labels and advertisements that included statements of the alcohol content of Coors' beer. J.A. 60-65.¹¹ ATF denied the application based on Sections 205(e)(2) and 205(f)(2). Pet. App. 73a-74a.

2. a. In July 1987, Coors filed this action against the Secretary and the Director of ATF in the United States District Court for the District of Colorado. Coors sought a declaratory judgment that the labeling and advertising restrictions in Sections 205(e)(2) and 205(f)(2) and their implementing regulations violate the First Amendment; Coors also sought an injunction barring enforcement of those provisions. J.A. 54-59. On cross-motions for summary judgment, the district court held that both Section 205(e)(2) and Section 205(f)(2) violate the First Amendment, and it enjoined their enforcement. Pet. App. 43a-54a.

b. The Tenth Circuit reversed and remanded. Pet. App. 10a-31a. It applied the four-part test articulated in

not contain more than 3.2% alcohol by weight"); Mass. Ann. Laws ch. 138, § 15 (Law. Co-op. 1981) (malt beverages containing 3.2% alcohol by weight or less "shall be so labelled"); Minn. R. § 7515.1110, subp. 2 (1985) (malt-beverage labels must state "contains not more than 3.2 percent of alcohol by weight"); Mo. Rev. Stat. § 312.310 (Supp. 1993) (malt-beverage labels must state "alcoholic content not in excess of [3.2% by weight or 4% by volume]"); Mont. Admin. R. § 42-13-201(2) (1993) ("[a]lcohol content by weight must be noted on the labels of all malt beverages" containing more than 7% alcohol by weight); Okla. Stat. Ann. tit. 37, § 163.19(b) (West 1985) (malt-beverage label may not indicate that alcohol content exceeds 3.2% by weight); Or. Admin. R. 845-10-205(2), (4) (1992); *Modern Brewery Age*, *supra*, at 270-271 (Oregon requires disclosure of alcohol content on labels of malt beverages containing more than 4% alcohol by weight).

¹¹ ATF is currently responsible for administering the FAAA. See Dep't of Treasury Order No. 120-01 (June 6, 1972) (formerly No. 221), reproduced at 37 Fed. Reg. 11,696 (1972).

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980), for analyzing restrictions on commercial speech. Applying the first part of the *Central Hudson* test, the Tenth Circuit determined that Sections 205(e)(2) and 205(f)(2) regulate non-misleading commercial speech regarding a lawful activity. Pet. App. 15a.

Applying the second part of the test, the Tenth Circuit held that the labeling and advertising restrictions are intended to further the federal government's "substantial" interest in "maintain[ing] moderate levels of alcohol in beer in order to protect the consumer." Pet. App. 19a. In that connection, the Tenth Circuit criticized the district court for "focus[ing] primarily on the validity of the asserted ends given the passage of time and changed circumstances." *Ibid.* The Tenth Circuit found it "irrelevant that the circumstances giving rise to a particular piece of legislation have changed so long as the legislation continues to serve some valid and substantial government interest." *Id.* at 20a. The Tenth Circuit concluded that the government had advanced "a legitimate and substantial interest" in this case by identifying "a continuing danger of strength wars similar to those that existed in 1935." *Ibid.*

The Tenth Circuit held, however, that there were disputed issues of fact with regard to the third and fourth parts of the *Central Hudson* test. Pet. App. 21a-31a. It determined that "the record here does not unambiguously reflect a correct legislative judgment that the enacted means directly advance the intended ends." *Id.* at 21a. In the court's view, "the link between advertising and strength wars is not self-evident," *ibid.*, and there were "genuine issues of material fact underlying the question of whether * * * the complete prohibition of [statements of alcohol content] results in a 'reasonable fit' between the legislature's goal and the means chosen to reach it," *id.* at 31a. The court of appeals accordingly reversed the order granting summary judgment in favor

of Coors and remanded the case to the district court for further proceedings. *Ibid.*

3. a. On remand, the government introduced extensive evidence concerning current conditions in the malt-beverage industry. Much of that evidence related to the malt-liquor segment of the industry. See, e.g., J.A. 207-214, 217-222; see also J.A. 92-93, 108-109. The government's evidence demonstrated that a primary reason why people choose malt liquor instead of other types of beer is because of its high alcohol content (J.A. 127, 344, 348, 350, 352-353, 356), and that malt-liquor producers market their product by emphasizing its high alcohol content (J.A. 127-128, 341, 343, 345-347, 350-351, 355-356; see also Defendants' Trial Exh. (DX) CS (at 11)). The evidence included numerous recent instances of efforts to market malt beverages on the basis of high alcohol content, in violation of the FAAA's labeling and advertising restrictions. See, e.g., J.A. 309-340; see also DXs R, S, and U through X. That evidence was not limited to the malt-liquor segment of the market. It showed, for example, that Coors had distributed wallet cards listing the alcohol content of its beers and those of its competitors. J.A. 206-207, 335-336, 342; see also J.A. 209-210 (Olympia beer), 216-217, 337-338 (Lowenbrau beer).

The district court upheld the advertising restriction in Section 205(f)(2), but it struck down the labeling restriction in Section 205(e)(2). J.A. 361-362; Pet. App. 32a-42a. The court found that there is a continuing threat of strength wars that justifies a prohibition on statements of alcohol content in advertising, *id.* at 34a, but it regarded labeling as different because it believed statements of alcohol content on labels would be used by consumers primarily to limit their intake of alcohol, *id.* at 37a.

b. Coors did not challenge the district court's ruling upholding the advertising restriction in Section 205(f)(2). The government, by contrast, did appeal from

the district court's ruling striking down the labeling restriction in Section 205(e)(2).¹²

c. A different panel of the Tenth Circuit affirmed. Pet. App. 1a-9a. The panel began by rejecting the government's contention that it was required, under the third part of the *Central Hudson* test, to show only that Congress "reasonably believed" that the labeling restriction would further the goal of preventing strength wars. The court expressed the view that this Court, in *Edenfield v. Fane*, 113 S. Ct. 1792 (1993), had adopted a "much stricter" standard for applying the third part of the *Central Hudson* test. Pet. App. 5a.

The Tenth Circuit then held that, under the stricter test, the government had failed to show that the labeling restriction furthers the goal of preventing strength wars "in a direct and material way." Pet. App. 7a.¹³ The court recognized that the legislative history supported Congress's judgment that the labeling restriction would "result[] over the long term in beers with a lower alcohol content." *Id.* at 6a, quoting *id.* at 17a. But focusing on what it perceived to be "changes in the malt beverage industry," the court determined that the government's evidence of a continuing threat of strength wars was insufficient in three ways. *Id.* at 6a-9a. First, the court discounted the evidence on the ground that it primarily concerned the malt-liquor segment of the market. *Id.* at 7a. Second, the court believed that there was an "absence of any record evidence indicating that there are strength wars in states or other countries where alcohol content labeling is already required." *Id.* at 8a. Finally, the court was unable to discern any evidence that "Coors

¹² After the district court's ruling, ATF published an interim rule suspending enforcement of the regulatory provisions that implement the statutory labeling restriction in Section 205(e)(2). 58 Fed. Reg. 21,228 (1993).

¹³ The Tenth Circuit accordingly found it unnecessary to decide whether the labeling restriction satisfies the "reasonable fit" requirement of the fourth part of the *Central Hudson* test. Pet. App. 9a n.6.

would engage in a strength war if it were able to disclose the alcohol content of its malt beverages." *Id.* at 8a-9a.¹⁴

SUMMARY OF ARGUMENT

I. The labeling restriction in Section 205(e)(2) satisfies the *Central Hudson* test for determining whether a regulation of commercial speech comports with the First Amendment. First, Section 205(e)(2) advances the substantial federal interest of preventing strength wars among malt-beverage brewers, in a manner that facilitates state regulation of alcoholic beverages. Moreover, the continuing risk of strength wars is real, and Section 205(e)(2) combats that risk in a direct and material way. Finally, Section 205(e)(2) is narrowly tailored to achieve that purpose.

The Tenth Circuit misapplied the *Central Hudson* test in declaring Section 205(e)(2) unconstitutional. In applying the second part of the test, the Tenth Circuit failed to identify fully the federal interest that Section 205(e)(2) was designed to serve. Specifically, the court ignored clear evidence that Congress intended Section 205(e)(2) to operate in tandem with, and facilitate the enforcement of, state laws regulating alcoholic beverages.

In applying the third part of the *Central Hudson* test, the Tenth Circuit made several errors. The court failed to recognize the self-evident proposition that, if the advertising of a product characteristic is prohibited, consumers are unlikely to select a product on the basis of that characteristic. Furthermore, the court gave no weight to historical evidence that a strength war existed at the time Section 205(e)(2) was enacted, focusing instead on perceived "changes in the malt beverage industry." Pet. App. 6a. Finally, the court misunderstood the significance of the evidence in the record concerning recent violations of the federal advertising and labeling restrictions in the malt-beverage industry.

¹⁴ The Tenth Circuit subsequently rejected the government's petition for rehearing and suggestion of rehearing en banc. Pet. App. 55a-56a.

Although the Tenth Circuit did not address whether Section 205(e)(2) satisfies the fourth part of the *Central Hudson* test, which inquires whether there is a "reasonable fit" between the legislative means and the legislative ends, the court expressed the belief that a reasonable fit is lacking because the labeling restriction in Section 205(e)(2) covers all types of malt beverages, whereas the threat of a strength war, in the court's view, exists only in the malt-liquor segment of the malt-beverage industry. That view cannot be reconciled with the district court's unchallenged holding that the evidence in the record supported the advertising restriction in Section 205(f)(2), which applies to all types of malt beverages. Nor can it be squared with evidence in the record that brewers of other types of beer, including Coors, have sought to compete on the basis of high alcohol content. More fundamentally, Congress could reasonably believe that a labeling restriction applicable to all types of malt beverages would be more effective in preventing strength wars than one applicable only to malt liquor.

II. Any doubt as to whether the labeling restriction in Section 205(e)(2) comports with the First Amendment should be resolved in favor of the statute's validity. The labeling restriction is entitled to an added presumption of validity, over and above the presumption of constitutionality normally accorded an Act of Congress, under two lines of cases. One line of cases recognizes that legislatures have broader latitude to regulate speech that promotes a socially harmful activity, such as alcohol consumption, which could be banned altogether, than they have to regulate other types of speech. See, e.g., *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986). The other line of cases holds that state laws regulating alcohol are entitled to an added presumption of validity when challenged on free speech grounds. See, e.g., *California v. LaRue*, 409 U.S. 109 (1972). The labeling restriction in Section 205(e)(2) is entitled to the same presumption, because it was enacted to enforce the Twenty-first Amendment by facilitating the enforcement of state laws regulating alcohol.

When accorded that presumption, the labeling restriction plainly comports with the First Amendment.

ARGUMENT

THE STATUTORY PROHIBITION OF ALCOHOL-CONTENT STATEMENTS ON MALT-BEVERAGE LABELS IN 27 U.S.C. 205(e)(2) COMPORTS WITH THE FIRST AMENDMENT

The Tenth Circuit held that the portion of 27 U.S.C. 205(e)(2) that prohibits statements of alcohol content on the labels of malt-beverage containers violates the First Amendment. In so holding, the Tenth Circuit relied on this Court's *Central Hudson* test for reviewing regulations of commercial speech. As discussed in Point I below, the Tenth Circuit misapplied the *Central Hudson* test, and for that reason alone the judgment below should be reversed. Moreover, as discussed in Point II below, Section 205(e)(2) should be reviewed under a less stringent standard than is applied under the *Central Hudson* test. A less stringent standard of review is required under this Court's decisions concerning the regulation of speech that promotes socially harmful activities, such as alcohol consumption, and this Court's decisions concerning free speech challenges to state alcohol regulations. Those two lines of decisions require courts to accord greater deference than is accorded under the third and fourth parts of the *Central Hudson* test to legislative judgments regarding the existence of a harm for which a legislative remedy is required, the extent to which the challenged regulation alleviates that harm, and the fit between the legislative means chosen and the legislative objective to be achieved.

I. THE LABELING RESTRICTION SATISFIES THE CENTRAL HUDSON TEST FOR MEASURING THE VALIDITY OF GOVERNMENT REGULATION OF COMMERCIAL SPEECH

This Court in *Central Hudson* articulated a four-part test for reviewing First Amendment challenges to government regulation of commercial speech (447 U.S. at 566):

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

See *Ibanez v. Florida Department of Business & Professional Regulation*, 114 S. Ct. 2084, 2088-2089 (1994); *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2703 (1993); *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993); *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 (1993); *Board of Trustees v. Fox*, 492 U.S. 469, 475 (1989). The labeling restriction in Section 205(e)(2) satisfies the *Central Hudson* test. The Tenth Circuit's contrary holding rests on several legal errors.¹⁵

¹⁵ To the extent that the Tenth Circuit's holding rests on findings of fact, those findings are not entitled to deference in this Court. In a First Amendment challenge, an appellate court must "independently decide" whether the record supports the judgment below. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 463 (1978); see also, e.g., *Rankin v. McPherson*, 483 U.S. 378, 385 n.8 (1987); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499-511 (1984); *Dunagin v. City of Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (en banc) (plurality opinion of Reavley, J.), cert. denied, 467 U.S. 1259 (1984); *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, 497 (10th Cir. 1983), rev'd on other grounds *sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984). Furthermore, to the extent that the Tenth Circuit disagreed with the congressional findings underlying Section 205(e)(2), Congress's findings, rather than the court's, are entitled to deference. See *Turner Broadcasting System, Inc. v. FCC*, No. 93-44 (June 27, 1994), slip op. 43; *Lockhart v. McCree*, 476 U.S. 162, 168 n.3 (1986); *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985).

A. The Labeling Restriction Advances A Substantial Governmental Interest

The first step in the *Central Hudson* inquiry relevant here¹⁶ requires a court to "identify with care" the interests asserted by the government. *Edenfield*, 113 S. Ct. at 1798. The Tenth Circuit failed to use the requisite care in identifying the governmental interest underlying the labeling restriction in Section 205(e)(2).

1. The Tenth Circuit recognized that Congress's central goal in enacting the labeling restriction in Section 205(e)(2) was to curb strength wars among malt-beverage brewers. Pet. App. 4a. The court ignored, however, the further purpose of Congress to pursue that goal in a manner that would respect and facilitate, and not supplant, state regulation of alcohol pursuant to the Twenty-first Amendment.

It is clear from the text of the FAAA that Congress intended to facilitate state regulation of alcohol. One of the express purposes of the FAAA is "to enforce the twenty-first amendment," 27 U.S.C. 203; that Amend-

¹⁶ As the first part of the *Central Hudson* test reflects, commercial speech must be truthful to qualify for even the "lesser protection" afforded to commercial speech by the First Amendment. *Edge Broadcasting*, 113 S. Ct. at 2703. Thus, "false, misleading, or deceptive commercial speech may be banned" without implicating the First Amendment. See, e.g., *Ibanez*, 114 S. Ct. at 2088; *In re R.M.J.*, 455 U.S. 191, 202-203 (1982). The brief of amicus curiae Center for Science in the Public Interest (at 4-6) argues that the statements of alcohol content for which Coors sought certificates of label approval are inherently misleading, because they can mislead consumers into incorrectly believing that a serving of beer has less alcohol than a serving of other types of alcoholic beverages. That argument was not advanced by the government in the courts below. See 89-1203 Opening Br. for Defendants-Appellants 15; cf. 89-1203 C.A. Br. of Appellants, the Speaker and Bipartisan Leadership Group of the U.S. House of Representatives 26 n.16.

ment, in turn, "directly qualifies the federal commerce power," thereby enhancing state power over alcohol. 324 *Liquor Corp. v. Duffy*, 479 U.S. 335, 346 (1987). Other provisions of the FAAA reflect a similar intent to enhance state authority over alcohol. Section 203, for example, provides that the requirement to obtain a federal permit to produce and distribute most types of alcoholic beverages (see p. 3, *supra*) "shall not apply to any agency of a State or political subdivision thereof." 27 U.S.C. 203. In addition, Section 204 requires the Secretary to deny a permit to any person whose "operations [are] proposed to be conducted * * * in violation of the law of the State in which they are to be conducted." 27 U.S.C. 204(a)(2)(C). Furthermore, Section 204 conditions all permits "upon compliance * * * with the twenty-first amendment and laws relating to the enforcement thereof." 27 U.S.C. 204(d). Finally, and most relevant here, both the labeling provisions in Section 205(e)(2) and the advertising provisions in Section 205(f)(2) are expressly designed to operate in tandem with state laws on the same subject. See pp. 5-6, *supra*.¹⁷

Congress's purpose in the FAAA to facilitate the enforcement of state laws was the basis for one of the earliest decisions upholding the statute against a constitutional challenge. In *Arrow Distilleries, Inc. v. Alexander*, 109 F.2d 397, cert. denied, 310 U.S. 646 (1940), the Seventh Circuit upheld an order of the FAA suspending a liquor producer's permit because of its failure to obtain

¹⁷ The legislative history of the FAAA confirms that Congress intended to enhance the ability of the States to enforce their own laws regulating alcohol. See 79 Cong. Rec. 11,714 (1935) (bill that became FAAA reflected Congress's belief that it "must do something to supplement legislation by the States to carry out their own policies") (remarks of Rep. Cullen); S. Rep. No. 1215, 74th Cong., 1st Sess. 3 (1935); H.R. Rep. No. 1542, 74th Cong., 1st Sess. 4 (1935); see also 79 Cong. Rec. 11,729-11,730 (remarks of Rep. Tarver), 11,788 (remarks of Rep. McCormack), 12,936 (1935) (remarks of Sen. George).

certificates of label approval and its misbranding of alcoholic beverages. The court rejected the contention that the Twenty-first Amendment deprived Congress of the authority to enact the FAAA. The court found nothing in the Amendment "to deny to Congress the power to legislate in aid of the state prohibitions [governing alcohol]." *Id.* at 400. On the contrary, the court determined that "[t]he twenty-first amendment authorizes Congress to take affirmative action to make effective the prohibition of the amendment against the importation or transportation of alcoholic beverages into states in violation of the laws thereof." *Id.* at 401. The court concluded that the FAAA is a valid exercise of that authority, because it "make[s] effective the protection which the twenty-first amendment gives to the states." *Ibid.* See also *Hanf v. United States*, 235 F.2d 710, 717 (8th Cir.) (Twenty-first Amendment imposed "an additional burden of enforcement" on the federal government, which FAAA was designed to shoulder), cert. denied, 352 U.S. 880 (1956); *Old Monastery Co. v. United States*, 147 F.2d 905, 907 (4th Cir.), cert. denied, 326 U.S. 734 (1945); *Hayes v. United States*, 112 F.2d 417, 422 (10th Cir. 1940).

The conclusion in *Arrow Distilleries* fully applies to the labeling restriction in Section 205(e)(2). As witnesses at the FACA Hearing in 1934 explained, state alcohol regulations at that time (as now) often included regulations that restrict the alcohol content of malt beverages. *FACA Hearing* 10-11, 38-39, 60, 62, 75-76; see also 79 Cong. Rec. 11,723 (1935) (remarks of Rep. Celler) (describing state laws limiting alcohol content of malt beverages). Those restrictions differed from State to State (and continue to do so, see J.A. 357-360). If a State imposes a restriction on alcohol content, the restriction reflects a judgment by that State regarding the maximum alcohol content appropriate for the health and welfare of its citizens. The labeling restriction in Section 205(e)(2), along with the advertising restriction in Section 205(f)(2), gives effect to such a judgment by an

individual State by making it less likely that a citizen from that State will travel to another State to purchase beer with a higher alcohol content. Cf. *South Dakota v. Dole*, 483 U.S. 203, 205-208 (1987).

2. In *Edge Broadcasting*, this Court reviewed a First Amendment challenge to a federal statute that, like the FAAA, was designed to complement state laws. *Edge Broadcasting* makes it clear that the Tenth Circuit misapplied the second part of the *Central Hudson* test and that that error undermined the Tenth Circuit's entire analysis.

At issue in *Edge Broadcasting* were the federal statutes (18 U.S.C. 1304 and 1307) that prohibit lottery advertising in States that do not operate lotteries, but permit lottery advertising in States that do operate lotteries. 113 S. Ct. at 2700-2701. The Fourth Circuit held that the statutes violated the First Amendment because, as applied to *Edge Broadcasting*, they "d[id] not directly advance the governmental interest asserted." *Edge Broadcasting Co. v. United States*, 5 F.3d 59, 62 (1992) (per curiam), rev'd, *United States v. Edge Broadcasting Co.*, *supra*. The Fourth Circuit based its holding on the fact that *Edge Broadcasting's* listeners in North Carolina, a State that does not operate a lottery, were "inundated" with lottery advertisements from neighboring Virginia, which does operate a lottery. *Ibid.* The Fourth Circuit decided that, with respect to that audience, the federal restriction provided only "ineffective or remote" support for "North Carolina's desire to discourage gambling." *Ibid.*

This Court reversed the Fourth Circuit's decision. *Edge Broadcasting*, 113 S. Ct. at 2704. The Court explained that the Fourth Circuit erred when it relied on the fact that the federal prohibition of lottery advertising operates only in nonlottery States to conclude that the prohibition provided only "remote" support for the goal of protecting the interests of nonlottery States, such as North Carolina. That fact, instead, reflected Congress's intent to further

the additional goal of protecting the interests of States, such as Virginia, that operate lotteries (*ibid.*):

In response to the appearance of state-sponsored lotteries, Congress might have continued to ban all radio or television lottery advertisements, even by stations in States that have legalized lotteries. This it did not do. * * * Instead of favoring either the lottery or the nonlottery State, Congress opted to support the antigambling policy of a State like North Carolina * * *. At the same time it sought not to unduly interfere with the policy of a lottery sponsoring State such as Virginia. * * * This congressional policy of balancing the interests of lottery and nonlottery States is the substantial governmental interest that satisfies *Central Hudson*, the interest which the courts below did not fully appreciate.

Like the Fourth Circuit in *Edge Broadcasting*, the Tenth Circuit in this case did not fully appreciate Congress's goal of accommodating a matrix of state laws. Appreciation of that goal is essential to a proper analysis of the labeling restriction under *Central Hudson*. If Congress's sole purpose had been to curb strength wars among malt-beverage brewers, it might well have enacted a different statute. For example, Congress might have chosen to limit the alcohol content of malt beverages.¹⁸ That limitation would have directly furthered the goal of preventing strength wars. But it would also have interfered with the State's authority to regulate alcoholic beverages (by devising their own limits on alcohol content or

¹⁸ Congress might reasonably have concluded that it had authority to impose federal limits on alcohol content pursuant to its power to regulate interstate commerce. See *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 346-347 (1987); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 274-276 (1984); *Capital Cities Cable Inc. v. Crisp*, 467 U.S. 691, 714 (1984); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980); *Hos-tetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-332 (1964).

choosing to impose no such limits) to a greater extent than does the labeling restriction.

In sum, *Edge Broadcasting* makes clear that a court must accurately identify the governmental interest underlying a restriction on commercial speech, as required under the second part of the *Central Hudson* test, before it can accurately determine whether the restriction directly advances the governmental interest, as required under the third part of the *Central Hudson* test. The Tenth Circuit's failure at the outset fully to identify the interests underlying the labeling restriction in Section 205(e)(2) undermined its subsequent analysis.

B. The Labeling Restriction Materially Advances The Asserted Governmental Interest

The third part of the *Central Hudson* test requires the government to show "that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Ibanez*, 114 S. Ct. at 2089, quoting *Edenfield*, 113 S. Ct. at 1800. The government made that showing here. It established that there is a continuing threat of strength wars among malt-beverage brewers and that the labeling restriction materially combats that threat.

1. The Evidence Establishes A Continuing Threat Of Strength Wars Among Malt-Beverage Brewers

The Tenth Circuit did not question the adequacy of the government's showing that there were strength wars among malt-beverage brewers when Section 205(e)(2) was enacted. Indeed, the court recognized that "the Act's legislative history * * * contains testimony 'that labels displaying alcohol content resulted in a strength war wherein producers competed for market share by putting increasing amounts of alcohol in their beer.'" Pet. App. 6a, quoting *id.* at 18a (first court of appeals opinion). Coors did not present any evidence rebutting the evidence

before Congress proving the existence of a strength war. Thus, it is undisputed that the harm at which the labeling restriction in Section 205(e)(2) is aimed was "real" (*Edenfield*, 113 S. Ct. at 1800) at the time of its enactment.

It is also undisputed that there continues to be a threat of strength wars in the malt-beverage industry. As the court of appeals observed, the government presented evidence (1) "that malt beverage manufacturers already are competing and advertising on the basis of alcohol strength in the malt-liquor segment of the market"; (2) "that consumers who prefer malt liquor do so primarily because of its higher alcohol content"; and (3) "that a number of manufacturers have tried to advertise malt liquor * * * to tout its alcohol strength." Pet. App. 7a. The court noted, moreover, that "Coors does not contest * * * the existence of such a threat." *Ibid.*¹⁹

2. The Labeling Restriction Combats The Risk Of Strength Wars In A Direct And Material Way

Although the Tenth Circuit did not doubt that there is a continuing threat of strength wars, it determined that "the Government has offered no evidence to indicate that the appearance of factual statements of alcohol content on malt-beverage labels would lead to strength wars or that their continued prohibition helps to prevent strength wars." Pet. App. 9a. That determination is flawed in three respects.

a. First, the Tenth Circuit erred by failing to discern any link between the advertising of a product charac-

¹⁹ The parties disagree over the scope of the current threat of strength wars in the malt-beverage industry. Coors has contended that the threat exists only in the malt-liquor segment of the industry. The government has contended that the threat is not so limited. Because this issue implicates the question whether Section 205(e)(2) is overly broad insofar as it applies to all malt-beverage labeling, we address it in our discussion of the fourth part of the *Central Hudson* test. See pp. 34-37, *infra*.

teristic (in this case, high alcohol content) and the extent to which consumers choose the product on the basis of that characteristic. Pet. App. 21a. This Court has recognized as a matter of common sense that a restriction on the advertising of a product decreases demand for the product. See *Edge Broadcasting*, 113 S. Ct. at 2707; *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328, 342 (1986); *Central Hudson*, 447 U.S. at 569. It follows that a restriction on the advertising of a product characteristic will decrease the extent to which consumers select the product on the basis of that characteristic. The Tenth Circuit accordingly erred in failing to hold that the labeling restriction directly advances Congress's goal of ensuring that "[m]alt beverages should not be sold on the basis of alcoholic content." H.R. Rep. No. 1542, 74th Cong., 1st Sess. 12 (1935).²⁰

²⁰ In a related context, this Court has recognized that people cross state lines to purchase beer at lower prices. See *Healy v. The Beer Inst.*, 491 U.S. 324, 326 (1989); *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 437 & n.8 (1983). It is just such behavior, which reflects the close connection between consumer purchasing decisions and product information, that has led the lower federal courts and the state courts to uphold, against First Amendment challenges, state restrictions on price advertising of alcoholic beverages. See *Queensgate Investment Co. v. Liquor Control Comm'n*, 433 N.E.2d 138 (Ohio) (per curiam), appeal dismissed for want of a substantial federal question, 459 U.S. 807 (1982), cited with approval in *Edge Broadcasting*, 113 S. Ct. at 2707; *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729 (R.I. 1985); *Rhode Island Liquor Stores Ass'n v. Evening Call Pub. Co.*, 497 A.2d 331 (R.I. 1985). "Common sense tells us that a lifting of the ban on price advertising will lead to a more competitive market." *44 Liquor Mart, Inc. v. Racine*, 829 F. Supp. 543, 554 (D.R.I. 1993), aff'd in part, rev'd in part *sub nom.* *44 Liquormart, Inc. v. Rhode Island*, Nos. 93-1893 & 93-1927 (May 2, 1994), opinion withdrawn and judgment vacated, aff'd in part, rev'd in part mem. (1st Cir. July 8, 1994); see *S & S Liquor Mart*, 497 A.2d at 735. Part of the reason such restrictions reduce the consumption of alcohol, of course, is that they prevent alcohol vendors from engaging in price competition. Just as alcohol price adver-

b. Second, the court ignored the historical evidence upon which the labeling restriction in Section 205(e)(2) was based. Cf., e.g., *Burson v. Freeman*, 112 S. Ct. 1846, 1856 (1992) (plurality opinion) (examining history of statute challenged on First Amendment grounds). The court recognized that the evidence before Congress when it enacted Section 205(e)(2) showed (1) "that labels displaying alcohol content resulted in a strength war"; and (2) "that not disclosing the alcohol content on malt beverages would relieve marketplace pressures to produce beer on the basis of alcohol content," and would thereby "result[] over the long term in beers with a lower alcohol content." Pet. App. 6a. Thus, the evidence clearly supported Congress's determination, at the time of Section 205(e)(2)'s enactment, that the disclosure of alcohol content had led to strength wars and that the prohibition of alcohol-content statements would prevent them. Those determinations by Congress are entitled to "substantial deference." *Turner Broadcasting System, Inc. v. FCC*, No. 93-44 (June 27, 1994), slip op. 42.²¹

tising restrictions prevent "price wars," so too do alcohol-content advertising restrictions prevent "strength wars." Cf. *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971) (upholding against First Amendment challenge ban on broadcast of cigarette advertising), aff'd mem., 405 U.S. 1000 (1972); *Dunagin v. City of Oxford*, supra (upholding against First Amendment challenge prohibition of most forms of alcohol sign advertising), cited with approval in *Posadas*, 478 U.S. at 347 n.10; *Oklahoma Telecasters Ass'n v. Crisp*, supra (rejecting First Amendment challenge to prohibition of all alcohol advertising except for one storefront sign); *Princess Sea Indus., Inc. v. State*, 635 P.2d 281 (Nev. 1981) (upholding against First Amendment challenge restrictions on brothel advertising), cert. denied, 456 U.S. 926 (1982).

²¹ The court of appeals appeared to believe that its disregard of the historical evidence was justified by *Edenfield*, which it read as adopting a "much stricter" standard for applying the third part of the *Central Hudson* test than this Court had applied in earlier

The Tenth Circuit ignored the historical evidence underlying the labeling restriction because of what it perceived to be "changes in the malt beverage industry and market since 1935." Pet. App. 6a; see also *id.* at 48a-50a (first district court opinion). In particular, the court believed that the evidence showed that "the vast majority of consumers in the United States value taste and lower calories—both of which are adversely affected by increased alcohol strength." *Id.* at 8a. Based on that evidence, the Tenth Circuit found it unlikely that permitting statements of alcohol content on labels would lead to strength wars. *Id.* at 9a.

The Tenth Circuit erred in relying on evidence that most beer consumers currently value taste and lower calories, qualities that, Coors asserted, would be adversely affected by increased alcohol strength. The history of the FAAA shows that at the time the labeling restriction was enacted, many consumers preferred high alcohol beer. Even if we assume that the majority preference has changed since that time, it can change again in the future.²² The validity of an Act of Congress should not depend upon such cyclical shifts in consumption patterns. Cf. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 (1983) (insufficiency of original motivation for restriction on commercial speech does not invalidate restriction if it continues to advance other legitimate purposes); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460

decisions. Pet. App. 5a. *Edenfield*, however, did not purport to heighten the showing required under the third part of the *Central Hudson* test, and the subsequent decision in *Edge Broadcasting* confirms that the third part of the *Central Hudson* test remains the same. 113 S. Ct. at 2704.

²² See J.A. 256 (testimony of Coors official, stating: "Our reason for being in business * * * is to meet consumer demand for a particular product. And *right now*, the consumer demand is for lighter and lower alcohol beer.") (emphasis added).

(1978) (same).²³ Moreover, the Tenth Circuit's reliance on the current preference of consumers for taste and lower calories ignores the role that the advertising and labeling restrictions have played in promoting those preferences, as distinguished from a preference based on alcohol content. There accordingly is every reason to expect that consumer preferences might change if respondent and other brewers were free to market malt beverages on the basis of their alcohol content. See Center for Science in the Public Interest Amicus Br. 15-17 (discussing current popularity of "ice" beer because of labels displaying its enhanced alcohol content).

In any event, the government showed that the current demand for high alcohol beer is large enough to pose a threat of strength wars. It showed that people who drink malt liquor choose it because of its high alcohol content, and that malt liquor is marketed on the basis of its high alcohol content. See p. 14, *supra*. Although the evidence indicated that malt liquor presently accounts for only 3% of the malt-beverage market, the evidence of the strong competition in that segment of the market also established that brewers consider it sufficiently large to warrant efforts to dominate it. See, e.g., J.A. 213, 244, 347; Deposition of Lutz E. Issleib 54-55, 58, 64-65; see also J.A. 157-158 (describing market in U.K. for high alcohol content beer). The evidence also showed that brewers would increase the alcohol content of their malt liquors if their competitors did so. See, e.g., Deposition of Lutz E. Issleib 66 (statement of chairman and chief executive of Pabst Brewing Company that "I play follow the leader,"

²³ Congress is in a better position than the courts to determine whether changed conditions warrant amendment or repeal of legislation. *Turner, supra*, slip op. 42. Significantly, Congress has on several occasions declined to enact bills to repeal the labeling restriction in Section 205(e)(2). See S. 2595, 99th Cong., 2d Sess. (1986); H.R. 1420, 103d Cong., 1st Sess. (1993).

and that his company would keep up with the competition in the area of alcohol content).²⁴

c. Finally, the Tenth Circuit improperly analyzed the evidence concerning recent violations of the labeling and advertising restrictions. That evidence showed, among other things, that malt-liquor manufacturers have violated the labeling and advertising restrictions of the FAAA by using "descriptive terms such as 'power,' 'strong character,' [and] 'dynamite[]' * * * to tout * * * alcohol strength." Pet. App. 7a. The Tenth Circuit thought it significant that the evidence primarily concerned the malt-liquor segment of the malt-beverage industry, and that violations in that segment of the market have primarily involved "descriptive," as distinguished from numerical, statements of alcohol content. *Id.* at 7a-8a & n.5. The court thus suggested that the government's interest in preventing strength wars could be adequately served by a labeling restriction that applies only to malt liquor, and not other types of malt beverages, and that prohibits only descriptive, and not numerical, statements of alcohol content.

i. The Tenth Circuit erred, in striking down the restriction under the third part of the *Central Hudson* test, by relying on its view that the labeling restriction could be more narrowly tailored. The question whether a statute is "more extensive than necessary" is relevant to the fourth, not the third, part of the test. *Fox*, 492 U.S. at 475-481. The court of appeals' error is significant because under the fourth part of the *Central Hudson* test, courts are required to accord substantial deference to Congress's judgment regarding the "fit" between the legis-

²⁴ The evidence of continuing marketplace pressure upon brewers to compete on the basis of high alcohol content was not limited to the malt-liquor segment of the industry. As discussed above, the evidence showed that Coors distributed wallet cards disclosing the alcohol content of its beer and that of its competitors. See p. 14, *supra*.

lative means and the legislative ends. *Id.* at 479-481; see *Edge Broadcasting*, 113 S. Ct. at 2707; *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 539 (1987); *Posadas*, 478 U.S. at 341-342; *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509 (1981). The Tenth Circuit, however, accorded no deference to Congress's judgment regarding the proper scope of the labeling restriction.

ii. Furthermore, the Tenth Circuit failed to explain why the government's evidence was not sufficient to sustain the *labeling* restriction in Section 205(e)(2), while the same evidence was held sufficient, in a ruling by the district court that respondent did not challenge on appeal, to sustain the *advertising* restriction in Section 205(f)(2). There is nothing in law or logic to support the conclusion that the same evidence that sustained the advertising restriction in Section 205(f)(2) does not also sustain the labeling restriction in Section 205(e)(2). See *Kordel v. United States*, 335 U.S. 345, 351 (1948) ("Every labeling is in a sense an advertisement."); see also *Halter v. Nebraska*, 205 U.S. 34 (1907).

The district court attempted to justify upholding the advertising restriction while striking down the labeling restriction on the ground that the labeling restriction does not add much to what is accomplished by the advertising restriction. Pet. App. 37a-38a. In *Edge Broadcasting*, however, this Court condemned similar reasoning as "represent[ing] too limited a view of what amounts to direct advancement of the governmental interest," 113 S. Ct. at 2706, and failing to allow adequate "room for legislative judgments," *id.* at 2707.²⁵ The advertising and

²⁵ The Court in *Edge Broadcasting* rejected a radio station's contention that the federal statutes that prohibit lottery advertising do not directly advance the government's goal of decreasing gambling in States that do not operate lotteries, because the statutes only modestly decreased the amount of lottery advertising to which people who listened to the radio station were exposed. *Edge Broadcasting*, 113 S. Ct. at 2706-2707. Coors advanced a similar

labeling restrictions at issue here operate in tandem and are mutually reinforcing. The court of appeals therefore erred in excising the labeling component of the integrated regulatory scheme.

iii. Finally, the Tenth Circuit misunderstood the significance of the fact that most recent violations of the advertising and labeling restrictions have involved descriptive, rather than numerical, statements of alcohol content. See Pet. App. 7a-8a. That fact signifies only that malt-beverage brewers cannot circumvent the restrictions on numerical statements as easily as they can the restrictions on descriptive statements. By the same token, it is easier to ascertain a violation of the numerical-statement restriction than to ascertain a violation of the descriptive-statement restriction, because the latter determination may require consideration of the connotations of a descriptive term and the context in which the term is used. See J.A. 102. Thus, the fact that the restriction on numerical statements is easier to enforce (and, from all that appears in the record, more consistently complied with) supports, rather than undermines, the validity of the restriction.²⁶

contention here: namely, that Section 205(e)(2) does not directly advance the government's goal of preventing strength wars, because it only modestly decreases the extent to which beer can be marketed based on its high alcohol content, in light of the other labeling and advertising restrictions on statements of alcohol content that Coors does not challenge. Under *Edge Broadcasting*, Coors' contention should be rejected.

²⁶ The Tenth Circuit also erred in stating that there is no evidence from other countries to support the effectiveness of the labeling restriction in preventing strength wars. Pet. App. 8a. In fact, there is evidence in the record concerning Canada and Britain, where disclosure of alcohol content is permitted, suggesting that the labeling ban has the effect of preventing strength wars. The record establishes that: (1) there has been a trend toward consumption of higher alcohol content beverages in the United Kingdom since the advent of alcohol-content labeling (J.A. 180-181, 189); (2) respondent's own beer has a higher alcohol level

C. The Labeling Restriction Is Narrowly Tailored To Advance The Government's Substantial Interest

The fourth part of the *Central Hudson* test asks whether the government's restriction is narrowly tailored to advance the government's asserted interest. *Fox*, 492 U.S. at 480; *Central Hudson*, 447 U.S. at 565. It "require[s] a fit between the restriction and the government interest that is not necessarily perfect, but reasonable." *Edge Broadcasting*, 113 S. Ct. at 2705. There is a reasonable fit between the labeling restriction in Section 205(e)(2) and Congress's goal of combatting strength wars in a manner consistent with state alcohol regulation. The labeling restriction does not prohibit the advertising of malt beverages; rather, it prohibits only the advertising of a single product characteristic. Moreover, the labeling restriction does not altogether prohibit the disclosure of the alcohol content of malt beverages; it prohibits only the use of that information in labeling and other forms of advertising, and thus allows brewers or the media to supply alcohol-content information outside of the advertising context. J.A. 214-215, 260; cf. *Ohralik*, 436 U.S. at 458 (attorney disciplinary rule before the Court "does not prohibit a lawyer from giving unsolicited legal advice; it proscribes the acceptance of employment resulting from such advice"). Thus, the scope of the labeling restriction "is 'in proportion to the interest served.'" *Fox*, 492 U.S. at 480, quoting *In re R.M.J.*, 455 U.S. at 203.

1. Although the Tenth Circuit did not consider the labeling restriction in Section 205(e)(2) under the fourth part of the *Central Hudson* test, it suggested that a "reasonable fit" is lacking because the labeling restriction applies to all types of malt beverages, whereas the evidence of a continuing threat of strength wars primarily

in Canada, where the alcohol content of malt beverages is shown on the label (J.A. 278-279); and (3) the light beer market is smaller in Canada than in the United States (J.A. 279-280).

concerned one type of malt beverage: malt liquor. Pet. App. 7a, 9a n.6.²⁷

Congress could reasonably have believed that a labeling restriction applicable to all types of malt beverages would be more effective than one applicable only to malt liquor. Congress's concern was not about a particular type of beer; its concern was about a particular type of beer-drinker: a person who, in the absence of a prohibition on the disclosure of alcohol content, would choose a beer based on its high alcohol strength. A labeling restriction applicable to all types of malt beverages more effectively prevents those people from choosing a malt beverage based on high alcohol content than would a restriction applicable only to malt liquor. First, a labeling restriction applicable to all malt beverages would generally prevent consumers from knowing with certainty even that malt liquors, as a category, have higher alcohol content than other types of malt beverages. J.A. 267 (testimony of Coors official that "there are a percent of consumers who do not currently know that certain categories of beer have more or less alcohol"). In addition, such a labeling restriction would prevent consumers from choosing among brands of *any* type of malt beverage (not just among brands of malt liquor) on the basis of their high alcohol content.²⁸

²⁷ Although the Tenth Circuit found it unnecessary to decide whether the labeling restriction satisfies the fourth part of the *Central Hudson* test, the issue was fully briefed and argued in both courts below and was raised in the government's certiorari petition. Defendants' Tr. Br. (CR 46), at 69-76; II Trial Tr. 287-293; Pet. 21-23. It is therefore properly before this Court. See, e.g., *United States v. Williams*, 112 S. Ct. 1735, 1738-1739 (1992).

²⁸ The same reasoning justifies Congress's enactment of an advertising restriction that, like the labeling restriction, applies to all types of malt beverages. As discussed above, however, neither court below explained why the labeling restriction should be struck down, even though the advertising restriction was upheld. See pp. 32-33, *supra*.

The differing effects of a labeling restriction applicable to all types of malt beverages and one applicable only to malt liquor can be illustrated by considering people who have just reached legal drinking age. Those young people, like many alcohol consumers at the end of Prohibition, may wish to choose a beer based on its high alcohol content. The young drinkers may not know that malt liquor is the type of beer with the highest alcohol content. They would readily be able to figure that out, however, if the disclosure of alcohol content were prohibited only with respect to beers the alcohol content of which exceeded a certain level.²⁹

Furthermore, the government presented evidence at trial showing that the problem of strength wars is not limited to the malt-liquor segment of the market. For example, the government showed that Coors produced Coors Extra Gold, a higher alcohol beer, to increase its share of the market, and that Coors' goal in bringing this litigation is to correct the "consumer misperception" that its beer has less alcohol than the competing brands. J.A. 251-253, 275-277, 342. That is precisely the type of behavior—*i.e.*, increasing the alcohol content of beer in order to increase one's share of the market, or emphasizing that one's product has as much alcohol as the competition—that Section 205(e)(2) is designed to discourage. The court of appeals itself acknowledged the force of this point on the prior appeal, observing that "Coors' admission at oral argument that it desires to publish the alcohol content of its products to dispel Coors' image of being a 'weak' beer testifies to the viability of the government's interest." Pet. App. 20a.³⁰

²⁹ For example, if the disclosure of alcohol content were prohibited with respect to beer that contained more than 5% alcohol by volume but were required for beer that contained 5% or less alcohol, a consumer could safely conclude that beer that was not labeled according to its alcohol content contained more than 5% alcohol.

³⁰ Cf. *Posadas*, 478 U.S. at 341-342 ("The Puerto Rico Legislature obviously believed * * * that advertising of casino gambling

2. The fit between the labeling restriction and the goal of preventing strength wars cannot be challenged on the ground that the restriction prevents people from choosing beer on the basis of its *low* alcohol content. ATF has construed Section 205(e)(2) to permit brewers to label and advertise their beers as "reduced alcohol" and "low alcohol." 54 Fed. Reg. 3591, 3594 (1989) (adding 27 C.F.R. 7.26(b)-(d)). That construction of Section 205(e)(2) permits consumers who wish to limit their alcohol content to do so effectively, without providing particularly useful information to consumers who wish to select a beer based on its high alcohol content.

3. Nor can the labeling restriction be challenged on the ground that strength wars could be combated just as effectively by requiring labeling that discloses the risks of alcohol abuse. As this Court explained in a similar context, "it is up to the legislature to decide whether or not such a 'counterspeech' policy would be as effective" as the labeling restriction. *Posadas*, 478 U.S. at 344. Congress has in fact required health warnings on the labels of most alcoholic-beverage containers. 27 U.S.C. 213 *et seq.* The fourth part of the *Central Hudson* test does not force Congress to choose between the two methods of regulation. See *Dunagin*, 718 F.2d at 751 & n.9.

II. THE LABELING RESTRICTION IS ENTITLED TO AN ADDED PRESUMPTION OF VALIDITY

Any doubt as to whether the labeling restriction comports with the First Amendment should be resolved in favor of its validity. A presumption of validity, over and above the presumption of constitutionality normally ac-

* * * would serve to increase the demand for the product advertised * * * and the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view."); *Central Hudson*, 447 U.S. at 569 ("There is an immediate connection between advertising and demand for electricity. *Central Hudson* would not contest the advertising ban unless it believed that promotion would increase its sales.").

corded an Act of Congress, is warranted here for two reasons. First, this Court and other courts have recognized that legislatures have broader latitude to regulate speech that promotes socially harmful activities, such as alcohol consumption, than they have to regulate other types of speech. See, e.g., *Posadas, supra*. Moreover, this Court has consistently held that state laws regulating alcohol are entitled, by virtue of the Twenty-first Amendment, to an "added presumption" of validity when challenged on free speech grounds. *California v. LaRue*, 409 U.S. 109, 118 (1972). The federal labeling restriction is also entitled to that presumption, because it was enacted to enforce the Twenty-first Amendment by facilitating the enforcement of state laws regulating alcohol.

A. The Labeling Restriction Is Entitled To An Added Presumption Of Validity Because It Regulates Speech Promoting A Socially Harmful Activity

"Legislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution, has varied from outright prohibition on the one hand, to legalization of the product or activity with restrictions on stimulation of its demand on the other hand." *Posadas*, 478 U.S. at 346 (citation omitted). The Nation's experience with Prohibition, mandated by the Eighteenth Amendment, demonstrated that an outright ban on alcohol consumption led to harms, such as the growth of organized crime and widespread disregard of the law, that were equal to or greater than the harms caused by the banned activity.³¹ That experience was fresh in Congress's mind when it enacted the labeling restriction in Section 205(e)(2). See S. Rep. No. 1215,

³¹ See 76 Cong. Rec. 8 (remarks of Rep. Sabath), 16 (remarks of Rep. McKeown), 27 (1932) (remarks of Rep. Horr); 76 Cong. Rec. 4148 (remarks of Sen. Wagner), 4226 (1933) (remarks of Sen. Tydings). See generally Spaeth, *The Twenty-First Amendment and State Control Over Intoxicating Liquor: Accommodating the Federal Interest*, 79 Calif. L. Rev. 161, 162, 176-180 (1991).

supra, at 3; H.R. Rep. No. 1542, *supra*, at 2; see also, e.g., 79 Cong. Rec. 12,936 (remarks of Sen. George), 12,943 (1935) (remarks of Sen. Copeland). Especially in light of the Prohibition experience, the labeling restriction represents a reasonable restriction on the promotion of an activity that Congress has reasonably deemed harmful.

This Court and other courts have repeatedly upheld reasonable restrictions on the advertising of activities that society deems harmful but has chosen for various reasons to tolerate. See *Edge Broadcasting*, 113 S. Ct. at 2700 (lotteries); *Posadas*, 478 U.S. at 344-347 (casino gambling); *Queensgate Investment Co. v. Liquor Control Comm'n*, 433 N.E.2d 138 (Ohio) (per curiam) (liquor price advertising), appeal dismissed for want of a substantial federal question, 459 U.S. 807 (1982); *Capital Broadcasting Co. v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971) (broadcast cigarette advertising), *aff'd mem.*, 405 U.S. 1000 (1972); *Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983) (en banc) (signs advertising liquor), cert. denied, 467 U.S. 1259 (1984); *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983) (prohibition of all alcohol advertising except for one storefront sign), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *S & S Liquor Mart Inc. v. Pastore*, 497 A.2d 729 (R.I. 1985) (alcohol price advertising); *Rhode Island Liquor Stores Ass'n v. Evening Call Pub. Co.*, 497 A.2d 331 (R.I. 1985) (same); *Princess Sea Indus., Inc. v. State*, 635 P.2d 281 (Nev. 1981) (brothel advertising), cert. denied, 456 U.S. 926 (1982). These decisions indicate that legislatures are entitled to especially broad latitude in regulating speech that promotes activities that the legislatures reasonably determine give rise to especially great social harms.

Greater deference to legislative judgment with regard to socially harmful activities is justified by the rationale underlying this Court's commercial speech doctrine. As

a general matter, commercial speech enjoys only "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values." *Fox*, 492 U.S. at 477 (quoting *Ohralik*, 436 U.S. at 456); see *Edge Broadcasting*, 113 S. Ct. at 2703; *Central Hudson*, 447 U.S. at 563. That is because commercial speech "is 'linked inextricably' with the commercial arrangement that it proposes," *Edenfield*, 113 S. Ct. at 1798 (quoting *Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979)), and commercial activity is "an area traditionally subject to government regulation," *Edge Broadcasting*, 113 S. Ct. at 2703 (quoting *Ohralik*, 436 U.S. at 456). The government's greater interest in, and authority over, regulation of commercial activity gives it greater interest in, and authority over, regulation of "the expression itself," *Edenfield*, 113 S. Ct. at 1798, than it has with respect to other forms of expression.

Certain commercial activities, such as gambling and the sale of alcoholic beverages, have traditionally been considered to pose particularly great risks of social harm. See, e.g., *Posadas*, 478 U.S. at 341 (casino gambling); *Stone v. Mississippi*, 101 U.S. 814, 818 (1880) (lotteries); Alcoholic Beverage Labeling Act of 1988, Pub. L. No. 100-690, Tit. VIII, § 8001(a)(3), 102 Stat. 4518, 4519 (codified at 27 U.S.C. 213, 215) (congressional findings regarding harms of alcohol consumption and abuse). Such activities accordingly have long been subject to particularly close regulation by the States and the federal government. See *Edge Broadcasting*, 113 S. Ct. at 2700-2701 (history of lottery regulation); *Craig v. Boren*, 429 U.S. 190, 205-206 & nn.18-19 (1976) (history of alcohol regulation). Indeed, the States plainly have authority under the Twenty-first Amendment to impose an outright ban on alcohol sales and consumption within their borders. See, e.g., *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). Similarly, the federal government's authority to regulate alcohol under the Commerce Clause is

broad. See, e.g., *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 346-347 (1987); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 274-276 (1984); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712-713 (1984); *California Retail Liquor Dealers Ass'n*, 445 U.S. at 108-110; *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-332 (1964).

The particularly strong governmental interest in regulating activities such as alcohol consumption gives rise to a concomitantly strong interest in regulating speech promoting those activities. Cf. *Edenfield*, 113 S. Ct. at 1798; *Posadas*, 478 U.S. at 345-347. By the same token, because such speech is "linked inextricably" (*Edenfield*, 113 S. Ct. at 1798) to a socially harmful activity, it warrants even less protection under the First Amendment than other forms of commercial speech. Thus, the balance of interests tips more sharply in favor of upholding a regulation of speech in this area than in other areas of commercial activity. For that reason alone, any doubt as to whether the labeling restriction in Section 205(e)(2) satisfies the *Central Hudson* test for regulations of commercial speech must be resolved in favor of upholding the restriction.

B. The Labeling Restriction Is Entitled To An Added Presumption Of Validity Because It Facilitates The Enforcement Of State Laws Within The Ambit Of The Twenty-first Amendment

The labeling restriction respondent challenges is, however, supported by more than general principles of First Amendment law concerning prohibitions against the promotion of socially harmful conduct. Here, there is affirmative support elsewhere in the Constitution itself—in the subsequently ratified Twenty-first Amendment—for the labeling restriction. In light of the Twenty-first Amendment, this Court held in *California v. LaRue*, 409 U.S. 109 (1972), that state laws regulating alcohol are entitled to an "added presumption in favor of * * * valid-

ity" when challenged under the Speech Clause of the First Amendment. *Id.* at 118. The federal labeling restriction is also entitled to such an added presumption; and, when accorded that presumption, it plainly comports with the First Amendment.

1. The Court in *LaRue* rejected a free speech challenge to state regulations that banned nude dancing and similar conduct in bars and nightclubs. See 409 U.S. at 111-112. The Court "[d]id not disagree" with the lower court's determination that the regulations, on their face, proscribed speech entitled to First Amendment protection. *Id.* at 116. But the Court "[d]id not believe," as the lower court had, that the regulations should be reviewed under the standard announced in *United States v. O'Brien*, 391 U.S. 367 (1968). *LaRue*, 409 U.S. at 116. Instead, the Court adopted a less stringent standard of review.

The Court in *LaRue* adopted a less stringent standard of First Amendment review because the regulations before it were within the ambit of the Twenty-first Amendment. The Court determined that "the broad sweep" of the latter Amendment "requires" that state laws regulating alcohol be accorded an "added presumption in favor of * * * validity." 409 U.S. at 114, 118-119. The Court explained that, while the States "require no specific grant of authority in the Federal Constitution" to regulate alcohol (since such regulation falls within their police power), "the case for upholding state regulation in the area covered by the Twenty-first Amendment is undoubtedly strengthened by that enactment." *Id.* at 114-115.

The *LaRue* Court upheld the challenged regulations under the standard of review required in light of the Twenty-first Amendment. The Court observed that the regulations were based on the State's conclusion that "the sale of liquor by the drink and lewd or naked dancing and entertainment should not take place in bars and cocktail lounges." 409 U.S. at 115. In the Court's view, that conclusion was "not * * * an irrational one." *Id.* at 116.

The Court also rejected the argument that the regulations were over-inclusive. It determined that "[n]othing in the record * * * or in common experience compel[led] the conclusion" that more narrowly tailored regulations would have been equally effective. *Ibid.* The Court accordingly held that the State's "choice" of legislative means "cannot * * * be deemed an unreasonable one under the holdings of our prior cases." *Ibid.*, citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-488 (1955).

LaRue makes it clear that this Court reviews free speech challenges to state alcohol regulations under a less stringent standard than applied under *Central Hudson*. *Dunagin*, 718 F.2d at 745 ("The test applied in *LaRue* * * * is less strict than that applied in *Central Hudson Gas*").³² The third part of the *Central Hudson* test requires a State to show "that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Ibanez*, 114 S. Ct. at 2089. By contrast, *LaRue* requires only that the State's judgment as to the existence of a harm and the effectiveness of the challenged regulation in preventing that harm be "not * * * irrational." 409 U.S. at 116. The fourth part of the *Central Hudson* test requires a court to determine whether the State has chosen "means narrowly tailored to achieve the desired objective." *Fox*, 492 U.S. at 480. By comparison, *LaRue* requires the court to uphold the legislative means as not "unreasonable" unless the record or common experience "compels" a contrary conclusion.

³² Although the Court has declined to extend *LaRue* beyond the free speech context, see *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982) (dictum); *Craig v. Boren*, 429 U.S. 190, 207-208 (1976), it has repeatedly applied *LaRue* in that context, including in decisions subsequent to *Central Hudson*. See *City of Newport v. Iacobucci*, 479 U.S. 92, 95 (1986) (per curiam); *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) (per curiam); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-933 (1975); see also *Dunagin*, 718 F.2d at 745 (finding it "[n]otabl[e]" that "*Bellanca* was decided after *Central Hudson Gas* and *Craig v. Boren*").

409 U.S. at 116 (citing *Williamson v. Lee Optical Co.*, *supra*).

2. Section 205(e)(2) should be reviewed under the *LaRue* standard, even though it is a federal, rather than a state, provision. As explained above (pp. 3, 20-23, *supra*), Congress enacted the FAAA, of which Section 205(e)(2) is a part, expressly for the purpose of enforcing the Twenty-first Amendment. 27 U.S.C. 203; see also 79 Cong. Rec. 11,713-11,714 (1935) (remarks of Rep. Cullen). Moreover, Congress designed Section 205(e)(2) to operate in tandem with state laws regulating alcohol and facilitate their enforcement. Accordingly, the principles of *LaRue* are fully applicable here. To conclude otherwise would mean that a state law could be upheld while a federal law necessary to the effective enforcement of the state law could be invalidated.³³

There is no basis in the text or history of the Twenty-first Amendment for such a dual standard. On the contrary, the significant authority over alcohol conferred by "the broad sweep of the Twenty-first Amendment" (*LaRue*, 409 U.S. at 114) is not limited to the States. The Amendment also applies to "Territor[ies]" and "possession[s]" of the United States, which are governed by federal law. See U.S. Const. Art. IV, § 3. Moreover, the Twenty-first Amendment was based on earlier pre-Prohibition federal statutes that were designed to assist state regulation of alcohol.³⁴ Finally, in proposing the

³³ Because the labeling restriction in Section 205(e)(2) may be overridden by a State, this Court need not decide whether *LaRue* would apply to a federal provision in a case involving "conflicting state and federal efforts to regulate * * * liquor." *Capital Cities*, 467 U.S. at 713.

³⁴ The Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (codified at 27 U.S.C. 122), prohibited the shipment in interstate commerce of liquor intended to be received, possessed, sold, or in any manner used in violation of the law of the State into which it was shipped. The Reed Amendment, ch. 162, § 5, 39 Stat. 1069 (1917), made violations of the Webb-Kenyon Act a federal crime. See also 18 U.S.C. 1262 (making it a federal crime to transport any intoxicat-

Twenty-first Amendment to the States, Congress understood that such federal legislation would be necessary to make the authority conferred on the States by the Amendment fully effective. See, e.g., 76 Cong. Rec. 26 (remarks of Rep. Horr), 791 (1932) (remarks of Rep. Blanton); 76 Cong. Rec. 2776 (remarks of Rep. Lea), 4168 (remarks of Sen. Fess), 4172 (remarks of Sen. Borah), 4221 (1933) (remarks of Sen. Barkley).³⁵ The long history

ing liquor into a State that prohibits sale of beverages containing more than 4% alcohol by volume). See generally de Ganahl, *The Scope of Federal Power Over Alcoholic Beverages Since the Twenty-first Amendment*, 8 Geo. Wash. L. Rev. 819, 822-823 (1940); Lydick, *State Control of Liquor Advertising Under the United States Constitution*, 12 Baylor L. Rev. 43, 47-48 (1960); Spaeth, *supra*, 79 Calif. L. Rev. at 181-182.

³⁵ Courts and commentators writing shortly after the ratification of the Twenty-first Amendment expressed the view that the Amendment itself provides Congress with authority to enact legislation that facilitates the enforcement of state laws regulating alcohol. *Arrow Distilleries*, 109 F.2d at 401; *Old Monastery*, 147 F.2d at 906-907; *Hayes v. United States*, 112 F.2d at 422; *Hanf v. United States*, 235 F.2d at 717-718; *Harris v. State*, 122 P.2d 401, 405 (Okla. Crim. App. 1942); see also de Ganahl, *supra*, 8 Geo. Wash. L. Rev. at 830; Note, *Federal Alcohol Administration Act*, 24 Geo. L.J. 433, 435 (1936). The conclusion that the Twenty-first Amendment is an independent source of congressional authority is not undermined by Congress's removal from the proposed Amendment of a provision (proposed Section 3) that would have given Congress "concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." 76 Cong. Rec. 4138 (1933); see also 324 *Liquor Corp.*, 479 U.S. at 353-356 (O'Connor, J., dissenting). The omission of proposed Section 3 appears to have been prompted by concern that it would enable the federal government to regulate at the local level in a manner that was inconsistent with state regulation of alcohol. 76 Cong. Rec. 2776 (remarks of Rep. Lea), 4143 (remarks of Sen. Blaine), 4144 (remarks of Sen. Wagner), 4146 (remarks of Sen. Borah), 4147 (remarks of Sen. Wagner), 4155 (remarks of Sen. Brookhart), 4156 (remarks of Sen. Hebert), 4173 (remarks of Sen. Borah), 4173, 4177 (1933) (remarks of Sen. Black). The labeling and advertising restrictions in the FAAA do not implicate that concern, because they govern only alcoholic beverages that

of federal assistance to support the States' efforts to regulate alcohol requires that the federal labeling restriction be reviewed under the same standard that applies to the state laws that it was enacted to support.³⁶

3. The federal labeling restriction is plainly constitutional under the *LaRue* standard.

First, the labeling restriction is reasonably related to preventing a harm that Congress rationally sought to avoid. It is based on Congress's judgment that "[m]alt beverages should not be sold on the basis of alcoholic content." H.R. Rep. No. 1542, *supra*, at 12. Here, as in *LaRue*, that legislative judgment was justified by "evidence from the [legislative] hearings" of particular abuses and by "the principle that [a legislature] may reason from the particular to the general." 409 U.S. at 115. Thus, Congress's conclusion that competition among brewers on the basis of high alcohol content should be prohibited was

move or are intended for movement in interstate commerce, and they apply in a manner that is consistent with state regulation. In any event, this Court need not resolve the issue of whether the Twenty-first Amendment is an independent source of congressional authority in deciding whether to apply the principle of *LaRue* in this case. In our view, *LaRue* governs here because the FAAA is within Congress's authority under the Commerce Clause, see *William Jameson & Co. v. Morgenthau*, 307 U.S. 171, 173 (1939) (per curiam) (challenge to FAAA raised "no substantial question of constitutional validity"); see also Appellant's Statement as to Jurisdiction at 8-10, *William Jameson & Co. v. Morgenthau*, No. 717 (O.T. 1938) (arguing, *inter alia*, that FAAA exceeded congressional authority under Commerce Clause); Brief for Appellant at 22-23, *William Jameson & Co. v. Morgenthau*, No. 717 (O.T. 1938) (same), and because Section 205(e)(2) is designed to enhance the enforcement of state alcohol laws.

³⁶ In States that have expressly adopted the federal labeling restriction as state law or otherwise adopted the same substantive restriction, see pp. 10-11 & nn.8, 10, *supra*, the validity of the federal restriction appears to be compelled by the text of the Twenty-first Amendment, which states in relevant part: "The transportation or importation into any State * * * for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. Amend. XXI, § 2.

"not * * * an irrational one." *Id.* at 116. It accordingly must be sustained under *LaRue*.

Moreover, the means chosen by Congress to prevent such competition likewise must be sustained under *LaRue*. *LaRue* gives a legislature "wide latitude as to choice of means." 409 U.S. at 116. Congress acted within that broad latitude in prohibiting statements of alcohol content on malt-beverage labels. Here, as in *LaRue*, "[n]othing in the record * * * or in common experience compels the conclusion" that other means—such as a labeling restriction applicable only to malt liquor or a requirement that alcoholic-beverage labels include warnings of the health dangers of alcohol—would have been equally effective in achieving the legislative goal. *Ibid.* Thus, the fit between the legislative means and the legislative ends "cannot * * * be deemed an unreasonable one," *ibid.*, and it therefore satisfies the *LaRue* standard. Section 205(e)(2) thus comports with the First Amendment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General

MICHAEL JAY SINGER

JOHN S. KOPPEL
Attorneys

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IN THE
Supreme Court of the United States
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LLOYD BENTSEN, SECRETARY OF THE TREASURY,
Petitioner,

v.

COORS BREWING COMPANY,
Respondent.

On Writ of Certiorari to the
United States Courts of Appeals
for the Tenth Circuit

BRIEF FOR RESPONDENT

BRUCE J. ENNIS, JR.*
DONALD B. VERRILLI, JR.
PAUL M. SMITH
NORY MILLER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

M. CAROLINE TURNER
TERRANCE D. MICEK
COORS BREWING COMPANY
12th and Ford Street
Golden, CO 80401

* Counsel of Record

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1631

LLOYD BENTSEN, SECRETARY OF THE TREASURY,
v. *Petitioner,*

COORS BREWING COMPANY,
Respondent.

On Writ of Certiorari to the
United States Courts of Appeals
for the Tenth Circuit

BRIEF FOR RESPONDENT

This case challenges a categorical ban on consumer information that is concededly truthful, important, and not even potentially misleading. Two courts found there was "no evidence" to justify the ban. The government, which conceded in its initial answer that the ban violates the First Amendment, subsequently asserted different interests at each stage of the proceedings in a continuing effort to find a justification for a law that has none. For the reasons that follow, the judgment below should be affirmed.

STATEMENT

A. Statutory Scheme

Shortly after the repeal of prohibition, Congress enacted the Federal Alcohol Administration Act (FAAA) of 1935. 49 Stat. 981-985, 27 U.S.C. § 201 *et seq.* Section 5(e)

of the Act regulates the labeling of alcohol beverages. 27 U.S.C. § 205(e).¹ Section 205(e)(2) *requires* disclosure of the alcohol content of distilled spirits and wine. But the very same provision *prohibits* disclosure of the alcohol content of malt beverages, unless state law affirmatively requires disclosure. *Id.*² The Act separately regulates advertising. Section 205(f)(2) prohibits statements of alcohol content in advertisements, but only in states that also prohibit such advertisements as a matter of state law. 27 U.S.C. § 205(f)(2).³ The advertising provision is not at issue here.

Section 205(e) was expressly enacted to "provide the consumer with adequate information" about alcohol products, and to prevent consumer "deception." 27 U.S.C. § 205(e). The House Report explained that the provi-

¹ Violation is a misdemeanor punishable by a fine of up to \$1000 per offense. 27 U.S.C. § 207.

² During the pendency of this litigation, the Bureau of Alcohol, Tobacco, and Firearms adopted a regulation that permits malt beverage labels to state that the beverage is low alcohol, "non-alcoholic," or "alcohol-free." 27 C.F.R. § 7.26(b)-(d). No court has considered whether this regulation is authorized by the statute, which provides that "statements of . . . alcoholic content of malt beverages are prohibited."

³ According to the government, the FAAA prohibits alcohol content labeling on malt beverages unless states affirmatively *require* disclosure, but prohibits alcohol content advertising of malt beverages only in states which impose similar restrictions. The government notes that Respondent has not challenged this interpretation. Pet. Br. 6 n. 4. That is not because Respondent agrees with it. Indeed, the statutory text states that both the labeling and the advertising bans apply only in states that impose similar restrictions. 27 U.S.C. § 205(f). And the Conference Report states that limiting the application of these provisions was the compromise reached between the House bill, which regulated malt beverages, and the Senate bill, which did not. See 79 Cong. Rec. 14565 (1935). However, resolution of that statutory interpretation question would not afford Respondent the full relief it sought below and would not avoid the necessity of reaching the First Amendment question before this Court.

sion was needed to "prohibit labeling . . . that is false [and to] provide for the prevention of deception of the consumer with respect to the product or its quality." H. Rep. No. 1542, 74th Cong., 1st Sess. 12 (1935) [hereafter "H. Rep."]. In presenting the bill to the full House, the chair of the responsible subcommittee stated that the "labeling and advertising requirements [are] designed to prevent deception of the consumer." 79 Cong. Rec. 11714 (1935) (Rep. Cullen).

B. Proceedings in This Case

In April 1987, Respondent Coors Brewing Company (Coors) submitted applications to the Bureau of Alcohol, Tobacco and Firearms (ATF), seeking nationwide approval of labels and advertising that simply disclosed the factual alcohol content of Coors Banquet beer and Coors Light beer. Applying Sections 205(e) and 205(f), ATF rejected the applications. J.A. 60-65. Coors challenged ATF's decision in federal court, arguing that the agency's rejection of its applications violated the First Amendment. J.A. 54-59. Coors did not challenge the government's power to prohibit manufacturers from using value-laden *descriptive* terms such as "strong" or "high test" to promote their products. Nor did Coors challenge the government's power to regulate the type size, placement, or method of calculating disclosures. Pet. App. 7a-8a, & n.5; J.A. 131. Coors challenged the statutory provisions only to the extent they banned truthful, verifiable, and non-misleading *factual* information about alcohol content. *Id.*

The defendants (the Secretary of the Treasury and the Director of ATF) conceded in their answer that the bans violated the First Amendment. Pet. App. 13a. Thereafter, the Speaker and Bipartisan Leadership Group of the U.S. House of Representatives intervened to defend the provisions, arguing that factual disclosure of the alcohol content of malt beverages is inherently misleading.

On cross-motions for summary judgment, the district court held the challenged provisions unconstitutional, as applied, under *Central Hudson Gas & Electric v. Public Service Comm'n*, 447 U.S. 557 (1980). Pet. App. 51a-54a. The court found that the alcohol content of malt beverages "can be very clearly pinpointed" with modern brewing technologies, and therefore that disclosure of numerical information is not inherently misleading today, even if it had been in 1935. Pet. App. 47a. The court also found that consumers have a substantial interest in receiving information about alcohol content in order to make more responsible decisions, and that far less restrictive regulations could prevent consumer deception. It therefore enjoined enforcement of the challenged aspects of the FAAA provisions. Pet. App. 47a, 50a, 54a.

On appeal, the intervenor defendant dropped its claim that Sections 205(e) and (f) were needed to prevent misleading speech, and Petitioner (who had joined in the appeal) expressly acknowledged that "accurate and specific statements of alcohol content" would not be misleading. Pet. App. 15a n.2; Pet. Br. 20 n.16. These appellants instead argued that the government's interest was avoiding "strength wars" among brewers. Pet. App. 18a. The court of appeals, concluding that the government's newly asserted interest might support the continuing validity of the provisions, remanded for an evidentiary hearing. Pet. App. 31a.⁴

On remand, Coors proved that disclosing alcohol content on labels would not produce strength wars. Coors showed that American consumers overwhelmingly prefer moderate and low strength malt beverages. Coors also showed that the states and countries that *require* disclosure had not experienced any strength wars among brewers. Pet. App. 8a. As one expert testified:

the whole basis of the US government's position, as I understand it, is that putting alcohol by volume on

⁴ The intervenor defendant withdrew after the appeal.

a can creates strength wars. And what I'm trying to tell you is that those places that have done it haven't had strength wars. . . . a strength war is fantasy.

J.A. 177, 173 (Ambler). Coors established that no strength wars have occurred in Canada, the United Kingdom, France, Germany, Belgium, Ireland, Portugal, Spain, Luxembourg, Holland, Germany, Denmark, Greece, Australia, New Zealand, or Norway—all of which require such disclosures. J.A. 140-45, 189, 195-96, 205 (Ambler). An ATF representative testified that the ATF was not aware of any strength wars in states that require disclosures. J.A. 104-05 (Black).

The government presented evidence that some "malt liquor" manufacturers had used value-laden *descriptive terms* such as "Tower of Power" to market their products in the United States. J.A. 210-14 (Cates). But the testimony also established that, even though the government has long permitted "malt liquor" to use that special name—which signals higher alcohol content (Pet. Br. 30; Nelson Dep. 81-82, 92, 111; J.A. 216 (Cates))—malt liquor is and always has been a fringe product, with "approximately three percent of the malt beverage market." Pet. App. 7a; J.A. 216 (Cates).

Finding *no* evidence that simply disclosing *factual* alcohol content on labels would promote strength wars, the district court held the labeling ban unconstitutional. Pet. App. 35a, 38a. On appeal from that judgment, the court of appeals affirmed. It agreed "that the Government had offered *no evidence* to indicate that the appearance of *factual* statements of alcohol content on malt beverage labels would lead to strength wars," and ruled that the ban did not advance the government's asserted interest in avoiding strength wars in a direct and material way, as required under *Central Hudson*. Pet. App. 9a (emphasis added).

SUMMARY OF ARGUMENT

Section 205(e)(2) criminalizes the disclosure of consumer information that is concededly truthful, factual, and important. Consumers have a substantial interest in receiving information about alcohol content in order to make more responsible decisions. Suppression of that information is not justified by the interest the government asserted below (avoiding strength wars) or by the new interest asserted here (avoiding strength wars in a manner that facilitates state regulation of alcohol).

1. The government has not shown that this ban directly and materially advances either interest, as required under *Central Hudson*, *Edenfield v. Fane*, 113 S. Ct. 1792 (1993), and *Ibanez v. Florida Bd. of Accountancy*, 114 S. Ct. 2084 (1994).

a. Section 205(e)(2) cannot be upheld on the basis of the record before Congress because Congress made *no legislative findings* regarding the provision, and the legislative history does not indicate that Congress enacted the ban to prevent strength wars. Congress expressly stated *in the statute* that Section 205(e) was intended to prevent consumer deception, and the government concedes the ban cannot be defended on that ground.

b. Section 205(e)(2) cannot be upheld on the basis of the evidence submitted to the district court. To the contrary, the evidence overwhelmingly shows that the labeling ban does not advance the government's asserted interests. No strength wars have occurred in states and countries that require or permit alcohol content disclosures on malt beverage labels. Even the ATF agrees that such disclosures will *not* lead to strength wars. Further, the ban does not advance the government's newly-fashioned interest in facilitating state regulatory choices. Rather, as construed by ATF, Section 205(e)(2) prohibits alcohol content labeling on malt beverages even in states that permit and encourage disclosure as a matter of state policy.

c. Section 205(e)(2) cannot be upheld on the basis of a purported "common sense" assumption that advertising will increase demand. *Cf. Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986); *United States v. Edge Broadcasting*, 113 S. Ct. 2696 (1993). Whatever its force generally, that assumption has no application here. It is no more a matter of common sense that disclosure of alcohol content will cause consumers to choose malt beverages with more alcohol than that disclosure of sugar content will cause consumers to choose cereals with more sugar. The link between disclosure of product traits and demand is much more complicated, and depends on whether consumers will want more or less of a particular trait, or will value a particular trait more or less than other traits. The district court made, and the Tenth Circuit affirmed, factual findings on that very issue, and concluded that consumers overwhelmingly prefer lower and moderate strength malt beverages. Pet. App. 37a.

2. Section 205(e)(2) also suppresses substantially more speech than necessary. *See Board of Trustees of SUNY v. Fox*, 492 U.S. 469, 479 (1989); *Central Hudson*, 447 U.S. at 565. The government could advance its asserted interests *directly*, more easily, and more effectively without suppressing any speech whatsoever simply by prohibiting the manufacture or sale of malt beverages with a higher than specified alcohol content, except in states that permit stronger malt beverages. Alternatively, the government could effectively advance its asserted interests with a considerably narrower regulation of speech—such as a prohibition of marketing malt beverages by touting alcohol strength (as other countries have successfully done) or a ban on label disclosures of alcohol strength in the "malt liquor" segment of the market.

3. Unable to prevail under settled legal standards, the government urges the Court to eliminate the protections of the commercial speech doctrine. There is no reason to

adopt the highly deferential standard of review the government urges.

a. The government's claim that extra "deference" is due Congress's regulatory choices whenever Congress restricts speech about activities that could be deemed "socially harmful" should be rejected. Whether conduct may be "socially harmful" is relevant to the substantiality of the government's interest, not to whether the chosen regulatory method will directly and materially advance that interest in an appropriately tailored way. Moreover, adopting the test urged by the government would involve the courts in endless policy judgments. It would also virtually eliminate First Amendment protection for commercial speech because nearly every suppression of speech could be cast as an effort to reduce socially harmful activities.

b. The Twenty-first Amendment does not require special deference here. The Twenty-first Amendment grants no power to the *federal* government, and thus cannot modify in any way the normal operation of the First Amendment as a constraint on Congress. And it is settled, even with respect to *state* power, that the Twenty-first Amendment does not limit or modify any constitutional provision other than the Commerce Clause. The Court has held that the Twenty-first Amendment does not alter the standard of review under the Equal Protection Clause, or under the Establishment Clause of the First Amendment, and there is no reason why it should alter the standard of review under the Free Speech Clause of the First Amendment. Accordingly, the Twenty-first Amendment would not alter the First Amendment standard of review otherwise applicable to a *state* law prohibiting disclosure of alcohol content on labels.

ARGUMENT

The government concedes that the alcohol content of a malt beverage is factual information that can be accurately measured and disclosed, and that the information at issue here is truthful and not misleading. Pet. App. 15a n.2, 47a; J.A. 68, 101; *see also* J.A. 243 (Patino).⁵ Furthermore, as the Tenth Circuit found, this is information "consumers have a substantial interest in knowing." Pet. App. 15a. Consumers are interested in this information *after* purchase, as well as before, in order to make more responsible choices about how much to drink. *Cf. Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983).

Suppression of such factual information "threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard." *Edenfield*, 113 S. Ct. at 1798. Thus, "the general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Id.* To overcome this presumption favoring disclosure, the government must advance "substantial" interests, and must carry the burden of proving that the ban it seeks to uphold "advances these interests in a direct and material way," and is not substantially more extensive than necessary. *Edenfield*, 113 S. Ct. at 1798. That burden is particularly heavy where, as here, the government does not seek to prevent

⁵ *Amicus* Center for Science in the Public Interest's claim that the blanket prohibition is necessary to prevent misleading disclosures is belied by its admission that "[i]deally, we would hope that Congress would enact legislation requiring that labels fully and completely inform consumers about the alcohol content of all alcoholic beverages." CSPI Br. 17. By its own admission, CSPI's concern would be eliminated if ATF adopted regulations requiring disclosure of alcohol content by serving size. *Id.* CSPI's concern is thus irrelevant to this case because, as noted *supra*, Coors has not challenged the government's power to regulate the form of disclosure, only the government's power to compel total silence.

or correct potentially misleading speech, but instead seeks to promote public ignorance about completely accurate information. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976); *Bolger*, 463 U.S. at 73-74.

I. THE GOVERNMENT HAS NOT SHOWN THAT THE BAN DIRECTLY AND MATERIALLY ADVANCES ITS ASSERTED INTEREST IN DETERRING STRENGTH WARS.

The government has not borne its burden of "demonstrat[ing] that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield*, 113 S. Ct. at 1800. The government tries first to avoid its evidentiary burden altogether by asking the Court to defer to posited but non-existent congressional findings. It then asks the Court to reweigh the factual record and reject the findings of two lower courts. Finally, it asks the Court to accept as "common sense" its asserted connection between label disclosures and strength wars, even though the evidence showed there was no such connection. All three attempts fail.

A. No Deference Is Due Congress Here.

The government's principal argument is that "congressional findings" provide a constitutionally adequate foundation for Section 205(e)(2), even if the evidentiary record in this case does not. Pet. Br. 2, 6, 19 n.15, 21, 25, 28, 31-32. That argument fails. Whatever deference is owed to congressional findings generally, none is warranted here because the enacting Congress *made no findings* of any kind, much less findings that support an interest in preventing strength wars. See *Sable Communications, Inc. v. FCC*, 492 U.S. 115, 129 (1989) ("Beyond the fact that whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law, our answer is

that the congressional record contains *no legislative findings* that would justify" deference) (emphasis added).

The statutory text itself makes clear that Congress enacted Section 205(e) to deter misleading and deceptive claims about alcohol content in malt beverages, 27 U.S.C. § 205(e), and the government has conceded that Section 205(e)(2) cannot be defended on that basis. Pet. App. 15a n.2. The House Report's discussion of the labeling and advertising provisions likewise emphasized that their purpose was "prevention of deception of the consumer" and prevention of statements "likely to mislead the consumer." H. Rep. at 12. In discussing the specific provision applicable to malt beverages, the Report expressed a concern with advertising that used numerals or symbols to "suggest" alcohol content, noting that "[u]sually such representations of excess alcoholic content are false" or misleading. H. Rep. at 12.⁶ When the bill was introduced on the floor of the House, it was described as an effort "to prevent the unfair trade activities of those in the industry who chisel and take advantage of the ignorance of the consumer by *dishonest* labeling and advertising." 79 Cong. Rec. 11714 (1935) (Rep. Cullen) (emphasis added).

Notably, the government *does not provide a single citation referring to strength wars* from the congressional hearings, floor debate, committee reports, or the text of the FAAA itself. That is doubtless because nothing in those sources suggests that Congress enacted the labeling

⁶ The House Report and the labeling and advertising provisions all use the phrase "irrespective of their falsity" to refer to statements which, although literally true, are misleading. H. Rep. at 12-13; 27 U.S.C. § 205(e), (f). The statute explains that Treasury is to prescribe labeling regulations "as will prohibit *deception* of the consumer with respect to such products . . . and as will prohibit, *irrespective of falsity*, such statements . . . as the Secretary of the Treasury finds to be likely to *mislead* the consumer." 27 U.S.C. § 205(e)(1) (emphasis added); see also 27 U.S.C. § 205(f)(1).

ban to curb strength wars. Nor does the record before Congress establish that Congress had a basis for predicting strength wars if malt beverage labels simply carried factual disclosures of alcohol content. Cf. Pet. Br. 28. In fact, the government is not relying on the legislative history of the FAAA at all, but on the 1934 hearing before the Federal Alcohol Control Administration (FACA), which adopted regulations that were *replaced* by the FAAA. There is no reference in the *congressional* record to that hearing.

In any event, that hearing does not begin to justify the government's position. The hearing on FACA's proposed "Misbranding Regulations, Series 9" focused (as the name suggests) almost exclusively on the risks of consumer deception.⁷ Several witnesses complained that brewers were using numerals as product identifiers, such as "6" or "number 9 beer," that had *nothing to do* with the amount of alcohol in the beer but would be misunderstood as claiming to be 6 percent or 9 percent alcohol.⁸ There was also testimony that some brewers had made false claims about alcohol content.⁹ Witnesses also testified

⁷ *Hearing Before the FACA With Reference to Proposed Regulations Relative to the Labeling of Products of the Brewing Industry* (hereafter "Misbranding Hearing") (cover of draft regulations) (Nov. 1, 1934).

⁸ See Misbranding Hearing at 7 (McCabe) (complaining that brewers were using "all sorts of numbers and figures, numerals, to convey the impression that the beer contained an excessive amount of alcohol which it did not contain"); *id.* at 29 (Jackman) (complaining of "fraudulent . . . statement, such as you have on [the label] with the figure 6, for example, which leads somebody to believe that that is the alcoholic content"); *id.* at 63 (Black) ("the prohibition of the use of numerals aims at misleading statements as to the alcoholic content"); *id.* at 65 (Mulvihill) (describing beer with the "misleading" label "9 Mule Brand").

⁹ Misbranding Hearing at 31-32 (Jackman) (discussing "a beer [claiming] a 12 per cent proof spirit, that analyzed . . . just slightly over 4 by volume").

that no brewer could accurately state the alcohol content of its beer within reasonable tolerances. Because of variations in the malt, atmospheric pressure, and temperature, alcohol content could vary from 3.2 to 4.5 percent from the same brewer using the same malt, and "the brewmaster has absolutely no control."¹⁰

Virtually all of the testimony at the FACA hearing focused on deception. Ignoring that testimony, the government seizes on isolated comments by one witness. In addition to testifying, as others had, that brewers were deceiving the public, and that malt beverages could not be labeled accurately, that witness also testified that he *believed* malt beverages would have lower alcohol content if they carried no alcohol content labeling at all. Misbranding Hearing at 33 (Jackman).¹¹

¹⁰ Misbranding Hearing at 27-28 (Jackman) (explaining that if brewers "were required to place upon our labels a statement to the effect that this beer contains 4 per cent of alcohol by volume, it just wouldn't be true and could not be done" and that this "is the consensus of opinion of the brewmasters and the brewery chemists."); 28 (Lutz) (agreeing that exact alcohol content was almost impossible to control).

¹¹ Mr. Jackman's prediction of a relationship between nondisclosure and low alcohol content was not based on studies or even anecdotal evidence. In contrast, his statements about mislabeled beer were based on chemical analyses. Not surprisingly, the government relies less on Mr. Jackman's actual testimony than on the Tenth Circuit's mischaracterization of it. Pet. App. 6a, citing Pet. App. 18a. In the hearing transcript where the first Tenth Circuit decision purports to find testimony that labels displaying actual alcohol content resulted in a strength war in which producers put increasing amounts of alcohol in their beer, Mr. Jackman actually testified that beer cannot be made that is high enough in alcohol content to do any damage, that most beers in this country were approximately 3.3% alcohol, that ale and beer are fermented differently, and that he favored a prohibition of alcohol content disclosures and of any other numerals on beer labels. Misbranding Hearing at 34-38. Mr. Jackman also testified that the stronger beer on the market had approximately 4.4% to 4.5% alcohol content by volume, *id.* at 25, that the highest alcohol content he had found was 4.86%, but that the brewer had not realized his beer

There is no reason to believe that isolated remarks by one witness at an agency hearing had anything to do with Congress's decision the following year to impose the labeling ban. Indeed, that testimony does not appear even to have been a basis for FACA's precursor regulations. To the contrary, FACA explained that its regulations were adopted:

[i]n order that the consumer may have adequate information as to the character of the product, and that members of the industry may be protected from unfair competition incidental to marketing of brewery products under labels which contain deceptive, untruthful or incomplete data.¹²

And when FACA's Chairman later testified before Congress, he explained that FACA's labeling and advertising regulations:

were intended to insure that the purchaser should get what he thought he was getting, that representations both in labels and in advertising should be honest and straightforward and truthful.

Hearings before the House Comm. on Ways and Means, 74th Cong., 1st Sess. 10 (June 19-20, 1935). There were also references during the *congressional* hearings to "frauds upon the public by false labels" on distilled spirits.

was that high and told Mr. Jackman he would "cut it down." *Id.* at 26. The *only* testimony Mr. Jackman gave drawing a link between label disclosures and higher strength beer was entirely speculative. *Id.* at 33, 73.

In addition, the government refers out of context to the testimony of another witness, Alexander H. Bell. Mr. Bell testified to one anecdote about a local brewer who had met competition by increasing "the alcoholic content of the beer to some extent" but then explained that "the brewers of this country . . . are now rapidly coming to the conclusion that beer should contain a low amount of alcohol." *Id.* at 59-60.

¹² Issuing announcement for the *Regulations Relating to the Labeling of Domestic Products of the Brewing Industry* (Jan. 15, 1935) (attached as appendix to Misbranding Hearing).

See, e.g., id. at 127. But there was *no* testimony before Congress that FACA's regulations had been adopted to curb strength wars. The government is attempting to infer Congress's purpose not from the statutory text, or congressional findings, or congressional reports, or floor debate, or congressional hearings, but from statements made by a single private citizen during an earlier agency hearing.¹³ That is far too slender a reed to support the government's case. The *only* basis for the labeling provision that can be gleaned from the legislative history is a concern that alcohol content labels on malt beverages might be misleading.¹⁴

B. The Record Shows That Labeling Would Not Lead To Strength Wars.

Two courts have reviewed the evidence in this case and both have found that:

¹³ Even if Congress had been aware of that citizen's remarks, those remarks could not justify the labeling ban. The remarks were "mere speculation or conjecture," *see Edenfield*, 113 S. Ct. at 1800, and "amount to little more than unsupported assertions without evidence or authority of any kind." *Ibanez*, 114 S. Ct. at 2092.

¹⁴ The government mischaracterizes the Tenth Circuit's decision in alleging that the court disregarded "the historical evidence" because it read *Edenfield* as adopting a "much stricter" standard than *Central Hudson*. *See* Pet. Br. 28 n.21. To the contrary, the Tenth Circuit relied on *Edenfield* as confirming the continued vitality of a standard that is "much stricter than the 'reasonably believed' standard the Government would have us adopt." Pet. App. 5a (emphasis added). The government further mischaracterizes the Tenth Circuit's decision in alleging that court "did not question the adequacy of the government's showing that there were strength wars among malt-beverage brewers" when the provision was enacted. Pet. Br. 25. The Tenth Circuit noted merely that the government's assertion about strength wars in 1935 was supported by testimony cited in the court of appeals' first opinion in this case, *not* that the testimony was conclusive. Pet. App. 6a. Moreover, the first court of appeals' opinion had not cited testimony before Congress, it had cited testimony before FACA. Pet. App. 18a. *See Johnson v. De Grandy*, 114 S. Ct. 2647, 2659 (1994) (description of testimony is not a finding).

the Government has offered *no evidence* to indicate that the appearance of *factual* statements of alcohol content on malt beverage *labels* would lead to strength wars or that their continued prohibition helps to prevent strength wars. Instead, it has offered only inferential arguments that are based on mere speculation and conjecture.

Pet. App. 9a (emphasis added).¹⁵ The record simply refutes the government's claim that disclosures of alcohol content on malt beverage labels will lead brewers to increase the strength of their products.¹⁶

¹⁵ The district court concluded that "no credible evidence that I have heard, lead[s] me to believe that giving alcoholic content on labels will in any way promote [] alcoholic strength wars. . . ." Pet. App. 38a.

¹⁶ To the extent the government argues here that the lower courts' findings of fact are incorrect, as it did in its Petition For Rehearing to the Tenth Circuit, this Court should follow its long-standing rule not to "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *United States v. Ceccolini*, 435 U.S. 268, 273 (1978); *Neil v. Biggers*, 409 U.S. 188 (1972). Here, the government has not claimed, and could not, that an "exceptional" error was made below. The government's attempt to avoid the two-court rule by arguing that the Court should review the facts *de novo*, Pet. Br. 19 n.15, misconstrues First Amendment law. Although an appellate court must independently decide whether the record supports a judgment upholding a restriction of speech, *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984), this Court has never held that *de novo* review of facts is appropriate where a court has upheld speech rights. See *Don's Porta Signs, Inc. v. City of Clearwater*, 485 U.S. 981 (1988) (denial of *certiorari*). The *de novo* requirement is imposed as a special procedure to make sure speech rights are not suppressed because of unjustified factual findings. But there is no danger that "the judgment . . . constitute[s] a forbidden intrusion on the field of free expression," *Bose Corp.*, 466 U.S. at 508, where, as here, free expression has been protected.

1. *The record shows that consumers prefer moderate and low strength malt beverages.*

The government presents no evidence to support its assertion that simply disclosing factual information about alcohol content on labels would lead consumers to choose higher strength malt beverages than they do now. Cf. *Edenfield*, 113 S. Ct. at 1800. Indeed, the evidence refutes that assertion. As the district court found, "[t]he evidence shows that the high-strength brews do not have the same popular appeal as the low-strength and the light beers, either abroad or in the United States." Pet. App. 37a. In fact, it showed that the fastest growing markets in the malt beverage industry were at the low end of the malt beverage alcohol range: light beers and non-alcohol malt beverages.¹⁷

The evidence also affirmatively shows that high strength malt beverages would be decidedly unpopular for reasons in addition to consumers' preference for moderation. Increasing the alcohol content of malt beverages unbalances their taste and makes them bitter and heavier. J.A. 228-29, 234-35, 248 (Patino) ("you can't just increase alcohol strength without affecting these other taste characteristics"). Increasing alcohol content also adds calories, and increases costs. J.A. 232-33, 245 (Patino), 286. Thus, "it would be extremely dangerous" for brewers to increase the alcohol strength of their established, mainstream products, J.A. 228 (Patino), and they have compelling economic incentives not to do so. J.A. 266, 268 (Rechholtz). As the Tenth Circuit found, Pet. App. 8a (emphasis added):

¹⁷ See J.A. 116 (Porter) ("Light beer products . . . are growing at a faster rate than the industry in total"), 264-65 (Rechholtz) (Coors' greatest growth in the past ten years is from light and non-alcohol beer, light beer generally is "approaching a third of the market"), 230-31 (Patino) ("[t]he no-alcohol market has been increasing tremendously," "almost two-thirds of [Coors' production] is light beer"); Nelson Dep. 38-39, 84 (light beer is 32% of the market; "the no-alcohol segment of the business has taken off like a rocket").

there is *uncontroverted* evidence that brewers in the United States have no intention of increasing alcohol strength, regardless of labeling regulations, because the vast majority of consumers in the United States value taste and lower calories—both of which are adversely affected by increased alcohol strength.

The “malt liquor” evidence on which the government places so much weight does not establish a connection between *factual* alcohol content disclosures and strength wars. Pet. Br. 26, 30. It proves the opposite. Consumers already know that malt liquor has a higher alcohol content than beer. Pet. Br. 30; Nelson Dep. 81-82, 92, 111; *see also* Pet. App. 7a. Nevertheless, whether because of its high alcohol content or its unpleasant taste, malt liquor has been able to garner only 3% of the malt beverage market. Pet. App. 7a, n.4; J.A. 216 (Cates), 285. Further, malt liquor has remained a fringe product even though it has been promoted—through *descriptive* statements—on the basis of alcohol strength. Pet. Br. 30; J.A. 208-214 (Cates); Pet. App. 7a-8a.

Moreover, the Tenth Circuit did not “fail[] to explain,” Pet. Br. 32 (emphasis added), why the malt liquor evidence was insufficient to sustain the labeling provision when the district court had commented that it would sustain the advertising provision. First, the Tenth Circuit *did* explain why it limited its review to the labeling provision. Pet. App. 4a-5a. The government, not Coors, appealed from the district court’s decision—and only from the part enjoining the labeling provision. *Id.* Furthermore, the district court’s comments on the advertising provision were *dicta* because Coors had dropped its challenge to the advertising provision during trial, Tr. at 301, as the Tenth Circuit knew. *See* Coors’ Answer Br. in No. 92-1348 at 2. Second, the Tenth Circuit’s reasoning—that the malt liquor evidence regarding *descriptive* statements is irrelevant to regulations suppressing *factual* disclosures of alcohol content—strongly suggests that had it been asked to review a decision upholding, on the basis of the malt liquor evidence, the prohibition of such *factual*

disclosure in advertisements, it would have reversed. *See* Pet. App. 7a-8a & n.5.

Finally, because the more alcohol put into a malt beverage product, the rougher and harsher it tastes, Nelson Dep. 18, even in producing a “spectrum” product—aimed at a small segment of the market—the inherent characteristics of brewing ensure that any increases in alcohol content would be very slight.¹⁸ Therefore, even if the government had made an evidentiary showing that alcohol content disclosures would lead brewers to produce stronger malt beverages than are now available—and it did not—that showing would necessarily have been too “marginal” to justify the burden Section 205(e)(2) places on speech. *See City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1509-10, 1515 (1993). At most, the government could claim only “paltry gains . . . only the most limited incremental support for the interest asserted.” *Id.* at 1509-10, 1515 (quotation omitted).¹⁹

¹⁸ Another limitation on the amount brewers could increase alcohol content is that some states impose maximum limits on alcohol strength. *See, infra*, note 37. Unlike the labeling ban, limits on maximum alcohol content effectively prevent production and sale of high strength malt beverages. *See* III.B.1, *infra*.

¹⁹ Nor is it clear what the government hopes to gain from its description of Coors’ reason for bringing this litigation. Pet. Br. 36. If the government is correct in presuming that most people think Coors’ regular beer is weaker than it really is, then presumably some portion of its customers have chosen that beer at least partially for that reason. Accurate labeling would be expected to cause some of those customers to switch to a beer with a lower alcohol content. Meanwhile, some number of beer-drinkers, who have avoided Coors on the mistaken assumption that it is “weak,” will discover that Coors has about the same alcohol content as the beer they currently drink and will switch to Coors for taste reasons. The net effect of the federal prohibition, with respect to Coors, is that consumers are drinking stronger beers than they think. And the net effect of consumer education would be to lower the average alcohol content consumed. Thus, the government’s argument actually demonstrates that the labeling ban *dis-serves* the government’s asserted interest. *See* Pet. App. 8a-9a.

2. *Empirical evidence from the many states and countries that permit or require alcohol content labeling on malt beverages demonstrates that labeling will not produce strength wars.*

Most Western countries, and some states, require malt beverage labels to carry alcohol content disclosures. The experience of these jurisdictions uniformly refutes the government's assertions. *See Edenfield*, 113 S. Ct. at 1804 (relying on the lack of problems in states that did not ban in-person solicitation by CPAs). States where alcohol content disclosures are required on the labels of malt beverages have not experienced strength wars. J.A. 104-05 (Black) (ATF is "not aware of any" strength wars in states that require disclosures). Canada, which has required alcohol content disclosures on malt beverage labels since 1976, has not experienced strength wars. J.A. 142-43, 205 (Ambler), 125 (Walker), 114 (Porter).²⁰

There is no evidence of strength wars among brewers in the United Kingdom, France, Germany, Belgium, Ireland, Portugal, Spain, Luxembourg, Holland, Germany, Denmark, Greece, Australia, New Zealand, or Norway, even though each country requires that the alcohol content of malt beverages be disclosed on their labels, and prior to that, permitted such disclosure.²¹ J.A. 140-45, 181, 189, 195-96, 205 (Ambler). Indeed, the average strength of malt beverages in the European Community and the United States hardly differs, despite their contrasting approaches to disclosure. J.A. 145 (Ambler) (EC main-

²⁰ The district court expressly found that "[i]n Canada, where alcoholic content is listed on the cans, there is no evidence of [strength] wars." Pet. App. 36a. Although the transcript says "price" wars, "strength" wars is clearly intended, as the government recognized by including "(sic)" after "price" in the appendix to its Petition. *Id.*

²¹ The United Kingdom, for example, has required label disclosures of alcohol content by volume since May 1989, and of alcohol by specific gravity since approximately 1979. J.A. 139 (Ambler).

stream ranges from 3.5 to 5.5 percent), 285 (US mainstream ranges from 4 to 5 percent).²²

3. *The agency charged with enforcing the ban does not believe it serves the asserted interest.*

ATF, the agency charged with monitoring the alcohol beverage industry and administering the FAAA, Pet. Br. 12, n.11, does not believe the ban on accurate, factual alcohol content labeling for malt beverages is necessary or useful to prevent strength wars among brewers. ATF has "favored allowing labeling which disclosed the alcoholic content of malt beverages," and has publicly advocated eliminating the ban. J.A. 67 (Defendants' Amended Answer); J.A. 91 (Black); Tr. 70-71 (Cates). ATF even suggested that Coors bring this challenge. J.A. 259 (Rechholtz). Indeed, while this challenge was being tried below, ATF was involved in a project to collect and publish "the alcohol strengths of all malt beverage prod-

²² The government's attempt below to eke support out of the marginally higher average alcohol content of malt beverages in Canada was properly rejected. Pet. App. 36a. Further, no relevant conclusion can be drawn from the smaller market for light beer in Canada than in the United States, Pet. Br. 33 n.26, because the market for high alcohol malt beverages (malt liquor) in Canada is also correspondingly smaller. J.A. 271 (Rechholtz).

In addition, the government misstates and misconstrues the record in arguing that certain evidence from Britain supports its strength war proposition. Pet. Br. 33 n.26. The testimony to which the government refers was that there have recently been trends toward purchase of better quality malt beverages in Britain and better quality wines in France, accompanied by a decrease in the volume purchased. The testimony further explained that these better quality products happen to be "slightly higher" in alcohol content, but that the difference is marginal and does not account for the purchasing choices. J.A. 175-76, 180, 195-96 (Ambler). Indeed, when armed with alcohol strength information, consumers who choose higher strength products are apparently consuming less of those products. J.A. 158 (Ambler). Furthermore, in Britain, where disclosure is required, the average alcohol content of malt beverages is lower (4%) than in the United States (4.5%). J.A. 167 (Ambler), 285.

ducts in the United States.” J.A. 215 (Cates). ATF has that information for most malt beverages, and will give it to any consumer who calls. J.A. 214 (Cates). ATF also permits producers to do so, as long as that information is not on a label or in an advertisement. Pet. Br. 34; J.A. 215, 260, 281-82 (Cates).²³

The U.S. Department of Health and Human Services (HHS) has likewise recommended that the “alcohol content of all beverages—including beer and malt liquor—[be] clearly displayed” on their labels. J.A. 296. HHS and ATF promulgated the mandatory label regulation that now requires warnings on all alcohol beverages, including malt beverages, stating that consumption of alcohol beverages is discouraged for pregnant women, impairs the ability to drive a car or operate machinery, and may cause health problems. 27 C.F.R. § 16.21.²⁴ Thus, the agencies with substantive responsibility in this area recognize the inconsistency between warning people that alcohol consumption entails risks, while depriving them of information they could use to better heed that warning.

²³ Contrary to the government’s suggestion, Pet. Br. 34, ATF’s willingness to give alcohol content information to the public, or to permit producers to do so outside of the normal channels of commerce, does not justify the prohibition of that information on labels. “[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.” *Bolger*, 463 U.S. at 69 n.18 (quotation omitted); see also *City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2045 (1994) (“by eliminating a common means of speaking, [measures foreclosing an entire medium] can suppress too much speech”); *Discovery*, 113 S. Ct. at 1515.

²⁴ The government acknowledges, however, and numerous studies show, that moderate alcohol consumption significantly reduces the risks of coronary heart disease. See Brief *Amicus Curiae* of the Wine Institute (No. 93-1631), at 5, 7. Congress has encouraged federal research on the health benefits of moderate consumption of alcohol. *Id.* at 8.

C. The Link Between Labeling and Strength Wars Is Not Self-Evident.

Lacking any factual support, the government argues that the “common sense” connection between advertising and demand noted in *Posadas* and *Edge Broadcasting* provides a sufficient justification for Section 205(e)(2). But that common sense proposition has no application here, as the court below recognized. Pet. App. 21a. The ban challenged here is a ban on informational disclosures on labels, not on promotional efforts in advertising. And the proposition the government asserts as “common sense” is that providing alcohol content information about the *entire range* of malt beverages will stimulate demand for *high strength* malt beverages.

It is no more a matter of “common sense” that disclosure of alcohol content will induce consumers to choose malt beverages that have more alcohol than it is a matter of “common sense” that disclosure of the sugar content of cereals will cause consumers to choose cereals with more regular, or that listing calories will cause consumers to choose foods with more calories. Indeed, the government failed to prove the very proposition it now asks the Court to accept on faith. The evidence showed that label disclosures would *not* stimulate demand for high strength malt beverages. Pet. App. 38a.

Furthermore, the allegedly “common sense” relationship between label disclosures and strength wars the government posits is not *direct*, as required under the First Amendment.²⁵ It is extremely attenuated. The government’s argument requires the Court to accept that: (1) consumers prefer beverages with higher alcohol content; (2) consumers cannot readily determine which products have higher alcohol content; (3) if consumers could determine the alcohol content of malt beverages through

²⁵ See *Central Hudson*, 447 U.S. at 564 (noting that “the Court has declined to uphold regulations that only indirectly advance the state interest involved”).

label disclosures, they would choose a higher alcohol malt beverage; (4) if brewers produced malt beverages with higher alcohol content they would increase their sales; (5) brewers would therefore produce stronger malt beverages.

This Court has repeatedly found such indirect rationales inadequate to justify restrictions on commercial speech. See *Virginia Pharmacy*, 425 U.S. at 748 (rejecting ban on advertising drug prices as a means of preventing pressure on pharmacists to lower standards); *Linmark Assocs., Inc. v. Willingboro Tp.*, 431 U.S. 85, 88 (1977) (rejecting ban on "for sale" signs as a means of preventing "panic selling" in an integrated neighborhood); *Central Hudson*, 447 U.S. at 557 (rejecting ban on promotion of off-peak consumption by utility as a means of avoiding increased peak consumption which would lead to inequitable rate increases).

In each case, as here, the government claimed that disclosing accurate, factual information would ultimately result—after a series of altered behavior patterns by both consumers and sellers—in activity the government would prefer to avoid but declined to regulate directly. Here, the activity the government claims it would prefer to avoid is competition among brewers to produce malt beverages with higher percentages of alcohol. But, like the advertising ban held unconstitutional in *Virginia Pharmacy*, the labeling ban "does not directly affect" the alcohol content of malt beverages "one way or the other." 425 U.S. at 769. At most, "it provides only ineffective or remote support for the government's purpose" and cannot be sustained. *Edenfield*, 113 S. Ct. at 1800 (quotation omitted). As this Court has made clear, "[s]uch conditional and remote eventualities simply cannot justify silencing" truthful and accurate product disclosures. *Central Hudson*, 447 U.S. at 569.

D. The Statutory Distinctions Bear No Relationship to the Government's Asserted Interest in Preventing Strength Wars, Which Confirms That Section 205(e)(2) Was Not Enacted For, and Will Not Advance, That Purpose.

The FAAA makes significant distinctions among types of disclosures and forms of communication that bear "no relationship *whatsoever* to the particular interests that the [government] has asserted" here. *Discovery*, 113 S. Ct. at 1514. Section 205(e) *prohibits* disclosure of alcohol content on the labels of malt beverages but *requires* disclosure for distilled spirits and wine over 14 percent alcohol. Both wine and distilled spirits can vary in strength, and both generally have substantially higher concentrations of alcohol than malt beverages. The government defends this provision on the ground that consumer knowledge of alcohol content will create a risk of strength wars. Yet the government has not even suggested a rationale, much less submitted evidence, to explain why this provision *requires* disclosure of alcohol content for products at the *high* end of the alcohol strength spectrum, thus ensuring that anyone interested in drinking beverages with the highest alcohol concentration will be able to identify those beverages. If consumer knowledge of alcohol content creates a risk of strength wars for low strength beverages, why would consumer knowledge of alcohol content not create an even greater risk of strength wars among higher strength products?²⁶ The statute's distinc-

²⁶ This distinction is particularly irrational in light of the substantial and undisputed overlap in the markets for beer, wine, and spirits. See J.A. 163 (Ambler) (markets for the three types of alcohol products "overlap to a very substantial extent"). Indeed, when ATF adopted regulations to permit alcohol content disclosures on malt beverage labels, in compliance with the district court's injunction, it chose to require that disclosures "use the same units of measurement" as other alcohol beverages so it would "be easier for consumers to compare the alcoholic content of a malt beverage with the alcoholic content of wine and distilled spirits." 58 Fed. Reg. 21229 (April 19, 1993).

tion between malt beverages and stronger alcohol products makes sense only if the statute was intended to prevent deception—its articulated purpose. In 1935, wine and spirits could be produced with alcohol levels within predictably close tolerances, but malt beverages could not. *See, supra*, page 4.

In addition, without explanation, the government interprets the statute to permit high alcohol content malt beverages to carry a special name—malt liquor—*on their labels*, which ensures that anyone interested in drinking high strength *malt* beverages will be able to identify those beverages. Indeed, the government argues that “people who drink malt liquor choose it because of its high alcohol content.” Pet. Br. 30.

Finally, the government’s interpretation of the statute makes a distinction between advertising and labeling that similarly bears *no* relationship to the government’s asserted interest in avoiding strength wars. As interpreted, the advertising ban applies only in states that have imposed similar bans; the labeling ban applies *unless* states affirmatively require disclosure. Pet. Br. 5-6 & n.4. Thus, in 33 states and the District of Columbia, the statute leaves brewers free to advertise alcohol content, but not to place the same information on labels.²⁷ In most of

²⁷ As the Statutory Appendix to this brief shows, 33 states and the District of Columbia do not prohibit factual statements of alcohol content in malt beverage advertisements. Therefore, in those jurisdictions the federal advertising prohibition does not apply. Nonetheless, the federal labeling prohibition does apply in those jurisdictions to ban alcohol content disclosures on labels of all or some malt beverages. Sixteen of those jurisdictions neither require nor prohibit alcohol content labeling and, therefore, no malt beverage labels may carry alcohol content disclosures solely because of the federal prohibition. In Oklahoma, no malt beverages may carry factual alcohol content labeling, partly because of a state prohibition (covering malt beverages under 3.2% alcohol by weight) and partly because of the federal prohibition. In Mississippi, malt beverage labels may disclose only that they are less than 4% alcohol by weight (unless foreclosed by federal law). In six states, some alcohol content disclosure is required by

the country, the statute, as interpreted, prohibits factual disclosure of alcohol content on beer labels even though the alcohol content of the same beer can be stated in television commercials, magazine ads, and store displays *right next* to the bottles and cans themselves.

Like the distinction between commercial handbills and newspapers in *Discovery*, the distinctions drawn here are “an impermissible means of responding to” the government’s asserted interest because they are wholly unrelated to that interest. *Discovery*, 113 S. Ct. at 1514. Indeed, the “selective approach” the statute takes to the dissemination of alcohol content information itself “suggests limits on the substantiality of the [government’s] interests.” *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715 (1984); *see also City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2044 (1994) (“Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: they may diminish the credibility of the government’s rationale for restricting speech in the first place.”). And here, where the asserted interest in strength wars finds no support in the statutory text or legislative history, the exceptions for wine, distilled spirits, malt liquor, and advertising confirm that the statute was *not* designed to curb strength wars, and will not directly and materially advance that interest.

state law, but malt beverages not covered by the state disclosure requirement are subject to the federal prohibition. Of these six, Oregon imposes the most extensive disclosure requirement: labels on all malt beverages over 4% alcohol by volume must disclose numerical alcohol content. In another ten states, the federal labeling prohibition *may* apply as state substantive law by incorporation, rather than *ex proprio vigore*.

E. The Government's Newly Asserted Interest in Protecting State Regulatory Policies Cannot Save This Ban.

The government cannot save Section 205(e)(2) by arguing that it is designed to prevent strength wars in a manner that also supports state policies. To begin with, the argument comes too late. Although the government chastises the court of appeals for failing to use "requisite care in identifying the governmental interests" underlying Section 205(e)(2), Pet. Br. 20, the government did not assert this "federalism" interest at any stage of the proceedings below. The court of appeals faithfully followed this Court's directive to "identify with care the interests *the state itself asserts . . . [and] not . . . supplant the precise interests put forward by the state* with other suppositions." *Edenfield*, 113 S. Ct. at 1798 (emphasis added). The government cannot assert a new interest in this Court, and then claim the Court of Appeals erred in failing to consider it.²⁸

In any event, this newly discovered solicitude for the states cannot redeem the statute. Indeed, it is far from clear exactly what the government is now arguing. To the extent Section 205(e)(2) merely parallels state labeling bans, the federal provision could not be constitutional unless the underlying state bans were themselves constitutional. But the government failed to show that any labeling ban would directly and materially advance an interest in curbing strength wars, thus precluding any argument that a state ban would advance such an interest. To the extent the government's federalism argument depends on the *exception* for states that require alcohol disclosure on malt beverage labels, the argument is equally misdirected. The exception might protect Section 205

²⁸ Because the government asserted this interest for the first time in this Court, it submitted no evidence to support its argument, and Coors had no opportunity to present evidence to show that the ban would not further this interest.

(e)(2) from a Twenty-first Amendment challenge by a state, but it cannot justify Section 205(e)(2)'s *suppression* of expression in states that do not require disclosure.

The government's "border crossing" argument (Pet. Br. 22-23) is particularly difficult to understand. The argument apparently assumes that, as a result of the labeling ban, residents of states that limit the alcohol content of beer will be less likely to travel to a neighboring state to obtain stronger beer because they will be less likely to know the beer is stronger. The government offered no evidence to support this speculation, and there is no reason to believe that residents of states with alcohol content limits would go to the trouble and expense of traveling to another state to find out if the beer there is stronger, instead of simply drinking an extra beer, or drinking wine or spirits in their home state. And this interest would not be advanced at all if neighboring states exercised their option under Section 205(e)(2) to mandate label disclosure. Furthermore, because Congress left *advertising* unregulated in the states (now 33 and the District of Columbia) that do not themselves ban advertising of alcohol content, information about the alcohol content of malt beverages will be freely available even if it is not permitted on labels. Residents of states that limit maximum alcohol content may well be exposed to that advertising by media that cross state borders, and will be exposed to it should they travel to the neighboring states. Finally, quite apart from its implausibility, the "border crossing" rationale, does not respect state sovereignty as a general matter. To the contrary, it sacrifices the interests of states that permit or encourage disclosure in order to protect the interests of states that wish to limit the alcohol content of malt beverages.²⁹

²⁹ The government's reliance on *Arrow Distilleries, Inc. v. Alexander*, 109 F.2d 397 (1940), and similar cases in support of this argument suggests that it misapprehends the nature of this chal-

The government's eleventh hour argument about state prerogatives is a transparent effort to make the present case resemble *Edge Broadcasting*. But *Edge* is inapposite. In *Edge*, the Court upheld a ban on lottery advertising by broadcast licensees located in states that banned lotteries. The federal advertising ban was plainly constitutional within such states because the underlying conduct was unlawful in those states. See *Central Hudson*, 447 U.S. at 566 (commercial speech doctrine does not protect speech proposing an unlawful activity). Although a particular licensee challenged the ban on the ground that it prohibited advertisements for lawful lotteries in neighboring states, the Court held that the only practical, administratively workable way to respect divergent state policies was to require the licensee to follow the policy of its home state.

In contrast, the federal statute at issue here does not respect state authority. As interpreted by the government, it affirmatively imposes a federal ban unless the state enacts contrary legislation. The federal ban governs not only in states that themselves prohibit alcohol content labeling, but also in states that permit, or even encourage, but do not require, such labeling. Pet. Br. 5, n.4.³⁰ States that would encourage alcohol content labeling for consumer protection purposes—but hesitate to impose a state-specific labeling requirement because of the cost of compliance or for other reasons—are thwarted from pursuing that policy choice through incentives and negotia-

tion. Coors has not argued that the government lacks power under the Commerce Clause to enact the provision in question. Coors' argument is that the provision violates the First Amendment.

³⁰ Similarly, the federal requirement that labels on spirits and wine disclose alcohol content applies even in states that do not want that information disclosed.

tion. The regulatory policies of these states are not promoted by the federal ban; they are obliterated. For example, California's Department of Alcohol Beverage Control recently eliminated its prohibition against disclosing alcohol content on malt beverages exceeding 4% alcohol by weight because it "has concluded that listing the amount of alcohol on malt beverage product labels will result in better informed consumers and mitigate against unknowing excessive consumption."³¹

II. THE GOVERNMENT HAS NOT SHOWN THAT THE BAN IS NARROWLY TAILORED TO ACHIEVE THE GOVERNMENT'S ASSERTED INTERESTS.

Section 205(e)(2) also violates the First Amendment because it is not "a means narrowly tailored to achieve the desired objective." *Fox*, 492 U.S. at 480; see also *Discovery*, 113 S. Ct. at 1510, n.12. When, as here, the restriction is "a categorical prohibition against the dissemination of accurate factual information to the public," the First Amendment imposes a particularly "heavy burden of justifying" the restriction—a burden the government has not even remotely carried. See *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91, 108 (1990).

³¹ See Cal. Emerg. Reg., OAL File No. 94-0224-03 E (Feb. 16, 1994). Texas also expressly repealed a prohibition against disclosing alcohol content on malt beverage labels. See Tex. Alc. Bev. Code Ann. § 101.41 (West 1994). Maine and Florida expressly permit, but do not require, alcohol content disclosures on malt beverage labels. See 1994 Me. Legis. Serv. Ch. 730 (S.P. 614) (L.D. 1712) (WEST); Fla. Admin. Code § 61A-4.006(1). See Statutory Appendix to this brief for other examples. The regulatory policies of these states, which include a substantial portion of the total population, encourage alcohol content labeling but their policies are nullified by the federal labeling prohibition. California, Texas and other states are thus wrongly described by the government as states which themselves prohibit or "acquiesce" in the federal labeling ban. See Pet. Br. 9-10 & nn. 7-10.

A. Whether the Labeling Ban Is Narrowly Tailored Must Be Carefully Scrutinized.

The government urges this Court to sustain Section 205(e)(2) simply on the basis that Congress "could reasonably have believed" it was sufficiently tailored. Pet. Br. 35. This Court has made clear, however, that the narrow tailoring requirement for commercial speech "is far different . . . from the 'rational basis' test." *Fox*, 492 U.S. at 480. A legislature may *not* adopt a restriction of speech—and particularly not a flat ban—"without reference to whether it does so at inordinate cost. . . . [T]he cost [must] be carefully calculated." *Id.*; see *Discovery*, 113 S. Ct. at 1510 n.13 (Court has "rejected mere rational basis review . . . in determining whether the 'fit' between ends and means is reasonable").

The fit between ends and means warrants particularly careful scrutiny here for two reasons. First, Congress "has not 'carefully calculated' the costs and benefits associated with the burden on speech imposed by its prohibition." *Discovery*, 113 S. Ct. at 1510. When the FAAA was enacted, statements on product labels were not considered protected speech.³² Moreover, as we have noted, there is no indication that Congress even had strength wars in mind when it enacted the FAAA. See *supra*, pages 11-15. It follows, *a fortiori*, that Congress did not even consider, much less determine, that the most appropriate way to avoid strength wars would be to prohibit alcohol content labeling of malt beverages. In these circumstances, there is no basis for giving deference to a supposed judgment by Congress about the best means to

³² See *Metromedia v. City of San Diego*, 453 U.S. 490, 505 (1981) (First Amendment protection for commercial speech first recognized in 1975); S. Rep. No. 338, 76th Cong., 1st Sess. 2 (1939) (showing contemporaneous congressional understanding that prohibiting radio advertising of alcohol beverages "would not affect any right of free speech").

accomplish its ends. See *Sable*, 492 U.S. at 129-32; *Bolger*, 463 U.S. at 70-71.³³

Second, it is obvious that the labeling prohibition prevents many people from having access to information they would use responsibly. Indeed, the district court found *as a fact* that

[C]itizen's . . . want the information; and the indication is they want it not to drink higher-alcohol beer but to be more responsible and for many to reduce the alcoholic content of what they're drinking . . . before they step into a car and subject themselves to the laws of the various states relating to driving under the influence or driving while ability impaired. It's extremely important that they be able to know the content of what they're drinking. Pet. App. 37a.³⁴

The government implicitly concedes as much, asserting only that there is "a *particular type* of beer-drinker . . . who . . . would choose a beer based on its high alcohol strength." Pet. Br. 35 (emphasis added). But that justification is like prohibiting new car stickers from listing horsepower because some consumers would choose high horsepower cars, even though most consumers would choose lower horsepower fuel-efficient cars, or like ban-

³³ The government's suggestion that the post-1935 introduction of bills in Congress warrants deference ignores the well-settled understanding that Congressional *inaction* is not a sound basis for construing legislative intent. *Helvering v. Hallock*, 309 U.S. 106, 121 (1940) ("we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle"); see also *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989); *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 332 n.24 (1981). Neither bill cited by the government ever came to a vote in either the House or the Senate. Nor is there firmer support for the government's suggestion that the Court should abdicate its responsibility to strike down laws that violate the First Amendment, and should simply wait until Congress decides to repeal the law. Pet. Br. 30 n.23.

³⁴ The district court's finding was based on substantial evidence. See, e.g., Tr. 176 (Rechholtz) ("consumers . . . desire to go to a

ning speedometers because some drivers might use the information to speed. J.A. 156 (Ambler).³⁵ Such "[b]road prophylactic rules . . . may not be so lightly justified." *Ibanez*, 114 S. Ct. at 2089.

Just as the "government may not reduce the adult population to reading only what is fit for children," *Bolger*, 463 U.S. at 73 (quotation omitted), a government policy that deprives responsible adults of factual information that can help them make important health and safety decisions must be viewed as extremely suspect. "The First Amendment . . . requires us to assume . . . that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them."³⁶ As we will now show, the gov-

lighter or lower alcohol product in the interest of moderation, in the interest of better dealing with responsible behavior"); Porter Dep. 58 ("there is an increasing awareness of the need for moderation").

³⁵ Several states have determined that consumers have a legitimate interest in knowing when they are drinking malt beverages that are *above* the lowest range of alcohol strength for malt beverages. Oregon, for example, requires all malt beverages above 4% alcohol by volume to disclose alcohol content on their labels. Montana requires label disclosure of alcohol content for malt beverages over 7% alcohol by weight. Arkansas requires malt beverages containing more than 5% alcohol by weight to so state. Other states require malt beverages below 4% to be labeled so consumers can distinguish lower strength from higher strength products. See Statutory Appendix to this brief.

³⁶ *Bolger*, 463 U.S. at 79 (Rehnquist, J., concurring in the judgment) (quotation omitted). Indeed, such a disproportionately adverse impact on beneficial speech would arguably fail the "narrow tailoring" requirement even if there were no alternative regulatory options. Here, as we will show, such options were readily available. See generally *id.* at 79 (Rehnquist, J., concurring in the judgment) (agreeing that the flat ban on direct mail advertising of contraceptives was unconstitutional and noting that although the ban advanced the government interest in permitting parents to guide their children's education concerning contraception, it also inhibited that interest by depriving parents of access to information "that might help them make informed decisions.").

ernment's argument is simply "insufficient to warrant the sweeping prohibition" of accurate, factual alcohol content disclosures on malt beverage labels. *Bolger*, 463 U.S. at 75.

B. The Government Could Use Effective But Less Restrictive Alternatives.

1. *The government could directly regulate the conduct of brewers.*

The government concedes that it could directly and effectively prevent strength wars without any suppression of speech whatsoever: "If Congress's sole purpose had been to curb strength wars among malt-beverage brewers, it might well have enacted a different statute. For example, Congress might have chosen to limit the alcohol content of malt beverages. That limitation would have directly furthered the goal of preventing strength wars." Pet. Br. 24. See Petition at 15 n.15 (Congress has the power to impose such a limit). That concession fatally undermines the government's case. Such a regulation could be easily enforced and would burden only the *conduct* of producers. It would not burden the rights of producers to speak or of consumers to hear.

The government lamely seeks to justify its choice of speech regulation over conduct regulation by arguing that a direct federal limit on alcohol content would "have interfered with the State's authority to regulate alcoholic beverages (by devising their own limits on alcohol content or choosing to impose no such limits)." Pet. Br. 24-25.³⁷ That is no answer. The government could serve *both* interests simply by imposing a federal limit on alcohol content but allowing an exception for states that prefer higher or lower limits.³⁸ Because Congress could

³⁷ Several states have imposed maximum limits on alcohol content for some or all malt beverages. Pet. Br. 4, n.2; J.A. 357-360.

³⁸ Depending on the degree to which Congress wished to accommodate state regulation of alcohol, such an exception could exempt

accommodate state policy and curb strength wars at least as effectively by regulating brewers directly as by suppressing speech, the First Amendment requires that it do so. *Discovery*, 113 S. Ct. at 1509-10, 1514 (invalidating speech regulation where city could easily and more directly have furthered its interests by regulating conduct).³⁹

2. *The government could regulate speech more narrowly.*

Alternatively, the government could impose one of several substantially narrower restrictions on speech. The government could simply prohibit marketing efforts that attempt to promote malt beverages (or any alcohol beverages) by emphasizing high strength. Such regulation has been successfully used in other countries. J.A. 41-42, 188-190 (Ambler) (discussing the codes used in the United Kingdom, Canada, and Denmark), 202 (UK Code C.XII § 5.4.1). The government relies exclusively on similar regulations to regulate the marketing of wine. J.A. 223 (Cates). Moreover, ATF representatives testified that ATF can effectively determine when manufacturers are promoting their products on the basis of

only states that had enacted positive law inconsistent with the federal limit, or could exempt all states that, absent the federal law, would permit stronger malt beverages.

³⁹ Even in *Posadas*, it was undisputed that there was no direct regulation of conduct that could have effectively accomplished the government's purposes. Prohibiting casino gambling altogether would have frustrated the government's pursuit of tourist income. No party even argued that residents could have been selectively prohibited from casino gambling, and Puerto Rico explained that such a prohibition would have been almost impossible to enforce. Appellee's Br., No. 84-1903, at 44. The one alternative suggested, an upper limit on gambling by residents, would obviously have been less effective, and arguably completely unworkable. Whether the limit would be per bet, per day, or per year was not specified, nor how it would be tracked or enforced.

strength, has been able to prevent strength wars in the wine and spirits industries (where alcohol content disclosure is mandatory), and has effectively policed strength promotions in the malt liquor market. J.A. 209, 211, 212-14, 221, 223 (Cates); Black dep. 70-71. *See also* Pet. App. 38a.

Similarly, even if there were support for the government's prediction that simply permitting labels to disclose *factual* information would lead to strength wars in the "malt liquor" segment of the market—and there is not—Section 205(e)(2) is a vastly over-inclusive response. The government could have limited the labeling ban to these malt liquor products. A supposed concern about a small fraction of the market cannot justify a labeling ban that covers all malt beverages. In sum, the government may not "completely suppress information when narrower restrictions on expression would serve its interests as well." *Central Hudson*, 447 U.S. at 565; *see also In re R.M.J.*, 455 U.S. 191, 207 (1982).

III. THERE IS NO BASIS FOR SUBJECTING SECTION 205(e)(2) TO A LESS DEMANDING STANDARD OF REVIEW.

There is no support in this Court's precedent or First Amendment doctrine for the government's final argument—that a less demanding standard should apply.

A. *Posadas* Did Not Establish a Lesser Standard for Reviewing This or Any Other Restriction on Commercial Speech.

Contrary to the government's assertion, this Court has never embraced the proposition that commercial speech about "a socially harmful activity . . . warrants even less protection under the First Amendment than other forms of commercial speech." Pet. Br. 41. *Posadas* held only that a government's interest in discouraging certain types of gambling by residents is legitimate and substantial and that banning advertising urging residents to engage in the

disfavored activity would directly and materially advance that goal. *Posadas*, 478 U.S. at 328, 341-42. *Posadas*'s conclusion that Puerto Rico's ban on promotional advertising would advance its interest in discouraging gambling has no bearing on whether the federal government's quite different ban of factual label disclosures will advance its quite different interest in preventing strength wars.

The government's suggestion, Pet. Br. 40, that the power to prohibit alcohol beverages altogether gives the federal government the power to suppress any related commercial speech completely misconstrues *Posadas*. The language on which the government relies purported only to distinguish Puerto Rico's ban from the bans invalidated in *Carey* and *Bigelow*⁴⁰. The appellant had cited these decisions for the proposition that "[i]f an activity is legal, the state cannot prohibit advertising it."⁴¹ The Court explained that those cases were "inapposite" because "the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the State" under constitutional provisions other than the First Amendment. *Id.* at 345-46. The Court went on to note that, in contrast, the conduct at issue in *Posadas*—gambling—could have been made unlawful, in which case speech proposing such unlawful activity would not be entitled to the protections of the commercial speech doctrine.

Posadas did not hold, however, that the unexercised power to ban casino gambling removed speech proposing casino gambling from all protection of the commercial speech doctrine, or justified a less demanding standard of review than the standard identified in *Central Hudson*. To the contrary, because Puerto Rico had not made casino gambling unlawful, speech proposing casino gambling did concern "lawful activity," *Posadas*, 478 U.S. at 340, and

⁴⁰ *Carey v. Population Services International*, 431 U.S. 678 (1977); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

⁴¹ Brief for Appellant in No. 84-1903, at 35.

the Court therefore analyzed Puerto Rico's advertising ban under each prong of the *Central Hudson* test.⁴² Likewise, *Edge Broadcasting* analyzed the federal lottery advertising rule under each prong of the *Central Hudson* test,⁴³ and declined to decide whether a lesser standard was appropriate.⁴⁴ Indeed, this Court has never held that any commercial speech about any lawful activity was subject to scrutiny less searching than that required by *Central Hudson*. In particular, this Court has never adopted the "reasonable basis" test the government appears to urge, Pet. Br. 35, because such a test would effectively eliminate First Amendment review. As noted, the Court has expressly rejected rational basis review in commercial speech cases. *Discovery*, 113 S. Ct. at 1510 n.13; *Fox*, 492 U.S. at 480. The whole purpose of First Amendment review—whether strict scrutiny or intermediate scrutiny—is to require the government to meet a higher standard before it is permitted to suppress speech than it is required to meet when regulating conduct.

⁴² *Id.* at 344 ("we conclude that the statute and regulations at issue . . . pass muster under each prong of the *Central Hudson* test").

⁴³ See *Edge Broadcasting*, 113 S. Ct. at 2699-2708 (Souter, concurring in part). Significantly, the Court applied the *Central Hudson* test to the federal ban at issue there even though the ban applied only to broadcasters located in states where gambling not only could be declared unlawful, but had been declared unlawful. Here, no state has declared the consumption of alcohol to be unlawful.

⁴⁴ 113 S.Ct. at 2703. The government had argued that "the greater power to prohibit gambling necessarily includes the lesser power to ban its advertisement" so that the Court "need not proceed with a *Central Hudson* analysis." *Id.* Such a rule would vitiate First Amendment protection of commercial speech. Few products or services are themselves constitutionally protected. Under the government's interpretation, Congress could therefore ban advertising—or impose any restriction on related commercial speech—about virtually any product or service. For example, under such a rule, because Congress can prohibit the sale of pharmaceuticals, it could ban advertisements listing pharmaceutical prices. Cf. *Virginia Pharmacy*, 425 U.S. at 773.

Accordingly, the Court should reject the government's appeal for a new constitutional rule creating multiple levels of scrutiny (and, effectively, *no* First Amendment scrutiny) based on judicial policy judgments about the social value of particular commercial activities. As a jurisprudential matter, such a rule would require virtually endless line-drawing. Even if a lesser level of scrutiny were considered appropriate for speech about casino gambling, which is deemed harmful and therefore banned in nearly all states, would the same scrutiny be appropriate for speech about malt beverages, which are banned in none, are consumed by 80 million adult Americans,⁴⁵ and are sold by the federal government at every military base? Is a strength war among brewers more or less socially harmful than *de facto* segregation hastened by "For Sale" signs or overconsumption of electricity? Cf. *Linmark*; *Central Hudson*. The taxonomy of "social harm" has no limiting principle.

Furthermore, it is unclear what social purpose would be served by abandoning review of the fit between suppression of the speech at issue and the interest it is alleged to serve, as the government urges. Pet. Br. 39, 41. That certain conduct is harmful may be enough to demonstrate that the government has a substantial interest in limiting it, but does *not* demonstrate that the particular means chosen will, in fact, do so, without inordinate cost. Just because the government has a target does not mean it is shooting in the right direction, or that it should be permitted to use exploding shells when an arrow would do.

If the government is not required to demonstrate that its regulatory choice would directly and materially advance its asserted interest without burdening substantially more speech rights than necessary, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on

⁴⁵ See *amicus* brief of The Beer Institute (No. 93-1631).

commercial expression." *Edenfield*, 113 S. Ct. at 1800. It is not surprising that the legislative and executive branches of government, from time to time, strain at the limitations on their power imposed by our regard for free expression. That is why we have the First Amendment.

B. The Twenty-first Amendment Does Not Justify a Lesser Standard for Reviewing This or Any Other Restriction on Commercial Speech.

1. *The ban at issue is federal law.*

The Twenty-first Amendment cannot possibly justify a less demanding standard of review for Section 205(e)(2) because the Twenty-first Amendment is not an affirmative grant of power to the federal government. To the contrary, it *restricts* federal authority by granting certain enumerated powers to the states.⁴⁶ Section 205(e)(2) is a federal law, interpreted and enforced by a federal agency. Nothing in the text of the Amendment, its history, or this Court's precedent provides support for the view that the Twenty-first Amendment cloaks such a law with any added presumption of validity.

2. *The Twenty-first Amendment does not supplant or modify First Amendment restraints even on state law.*

It is settled that the Twenty-first "Amendment does not license the states to ignore their obligations under other provisions of the Constitution." *Crisp*, 467 U.S. at 712. Instead, "the Amendment primarily created an exception to the normal operation of the Commerce Clause." *Id.* at 712 (quotation omitted).⁴⁷ "Once passing beyond consid-

⁴⁶ "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." United States Constitution, XXI Amendment, § 2.

⁴⁷ Even the Twenty-first Amendment's restriction on the federal government's power under the Commerce Clause does not

eration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. . . . Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned." *Craig v. Boren*, 429 U.S. 190, 206 (1976) (quotation omitted). Thus, in *Craig* the Court held that "the operation of the Twenty-first Amendment does not alter the application of equal protection standards that otherwise govern this case." *Id.* at 209-10.⁴⁸ Similarly, states "may not exercise [their] power under the Twenty-first Amendment in a way which impinges upon the Establishment Clause of the First Amendment." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982); see also *Dep't of Revenue v. James Beam Co.*, 377 U.S. 341 (1964) (Export-Import Clause); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (Due Process Clause).

repeal the power of federal legislation to preempt state legislation. It "merely requires that each provision be considered in light of the other." *Craig v. Boren*, 429 U.S. at 206. Many state liquor regulations have been found invalid as inconsistent with legislation enacted by the federal government under the Commerce Clause. See, e.g., *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987) (liquor pricing system); *Crisp* (ban on alcohol beverage advertising); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984) (liquor tax); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.*, 445 U.S. 97 (1980) (liquor pricing system).

⁴⁸ In reviewing the differential treatment of men and women under the Equal Protection Clause, *Craig v. Boren* applied the requisite intermediate level of scrutiny—whether the statute was substantially related to achieving important government objectives—a test virtually identical to that applicable to restrictions of commercial speech. 429 U.S. at 197. If the Twenty-first Amendment does not justify relaxation of the intermediate standard of review under the Equal Protection Clause of the Fourteenth Amendment, it also cannot justify relaxation of the intermediate standard of review under the First Amendment.

Thus, even if Section 205(e) were treated as though it were a state law, the government is simply wrong in arguing that the Twenty-first Amendment alters the First Amendment standards that would otherwise govern this case. *California v. LaRue*, 409 U.S. 109 (1972), does not even remotely support that argument. The regulation upheld in *LaRue* was valid under the First Amendment, without regard to the Twenty-first Amendment. The regulation barred nude dancing in bars with state liquor licenses—conduct "only marginally . . . within the outer perimeters of the First Amendment."⁴⁹ It was expressly aimed at the secondary effects of that conduct, see 409 U.S. at 111 (referring to prostitution, rapes, and assaults), and was therefore "justified without reference to the content of the regulated speech," *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). Furthermore, the regulation deterred "the commission of public acts that may themselves violate valid penal statutes," 409 U.S. at 117, and was therefore "unrelated to the suppression of free expression." *Texas v. Johnson*, 491 U.S. 397, 407 (1989). To the extent the regulation carried an "added presumption of validity," that was because it regulated *conduct* at the heart of the state's Twenty-first Amendment power. The opinion did not purport to suggest that all regulation of *speech* related to alcohol beverages should be subjected to deferential review. Indeed, the Court has cited *LaRue* for precisely the opposite proposition. See *Crisp*, 467 U.S. at 712.

In contrast, Section 205(e) directly affects printed speech that concededly provides important and truthful consumer information. It expressly prohibits manufacturers from placing accurate, factual information on printed labels *because the government does not want consumers to have that information.*⁵⁰ Moreover, even a state statute

⁴⁹ *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2457 (1991).

⁵⁰ As *LaRue* makes clear, "the scope of permissible state regulations significantly" decreases when the "mode of expression" is not

restricting labeling would not implicate the "core § 2 power" conferred by the Twenty-first Amendment. *See Crisp*, 467 U.S. at 713. Like the advertising ban invalidated in that case, a labeling ban "engages only indirectly the central power reserved by § 2 of the Twenty-first Amendment—that of exercising control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Id.* at 715.

Thus, if challenged, a state ban on alcohol content labeling of malt beverages would be subject to the same standard of review as is the federal ban at issue here. And if the state's justification for such a ban were an asserted interest in preventing strength wars, on this record such a ban would plainly fall, just as the federal ban must fall.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

BRUCE J. ENNIS, JR.*
DONALD B. VERRILLI, JR.
PAUL M. SMITH
NORY MILLER
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000
M. CAROLINE TURNER
TERRANCE D. MICEK
COORS BREWING COMPANY
12th and Ford Street
Golden, CO 80401

* Counsel of Record

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potentially expressive conduct but "the printed page." 409 U.S. at 117.

STATUTORY APPENDIX

STATUTORY APPENDIX ¹

Note: Some states measure alcohol content by weight and some by volume. A rough translation of alcohol by weight into alcohol by volume is obtained by dividing the percentage of alcohol by weight by .8. For example, a beverage that is 3.2% alcohol by weight is approximately 4% alcohol by volume.

ALABAMA

No advertising rule.

Required to file federal certificate of label approval.
Ala. Code § 28-3A-6(c) (1975).

ALASKA

No advertising rule.

No labeling rule.

ARIZONA

No advertising rule.

Beer must be "labeled in conformity with the labeling regulations prescribed by the Federal Alcoholic Administration Act or any other Regulations adopted by the Federal Alcoholic Administration or any other Regulations adopted by the government of the United States, officer, bureau, or agency thereof. Any amendments or changes in the Federal Alcohol Administration Act or any other Regulations adopted by the government of the United States, officer, bureau or agency thereof pertaining to labeling are hereby made a part of this regulation without further adoption by the Department." Ariz. Comp. Admin. R. & Regs. R4-15-220 (6) (Supp. 1982).

¹ This Appendix is intended as a general summary only. State law on these subjects is composed of administrative regulations, emergency orders, attorney general opinions, administrative bulletins, and administrative rulings, as well as statutes, and is constantly changing.

ARKANSAS

Licensee may not violate or fail to comply with federal advertising regulations. Title 1, Subtitle G., § 1.78(1); point of sale advertising must conform with current federal regulations. Alc. Bev. Control. Regs § 2.28(4) (1991). Malt liquor or stout beer containing more than 5% alcohol by weight must so state on container. Ark. Alc. Bev. Cont. Div. Regs § 2.17 (1991).

CALIFORNIA

No advertising rule.

Malt beverage products that exceed 4% alcohol content by weight must bear a label that designates the contents as ale, porter, brown, stout, or malt liquor. Bottled or canned ale, porter, brown, stout, or malt liquor of 4% or less alcohol by weight must bear a label certifying that the alcoholic content is no greater than 4%. Cal. Code Regs. tit. 4, § 130 (1994).

By emergency regulation earlier this year, California eliminated its prohibition against alcohol content disclosures on labels of malt beverages exceeding 4% alcohol content by weight. The Department of Alcoholic Beverage Control explained that it was "convinced that it is in California consumers' best interest, as well as sound public policy, to have the percentage of alcohol in malt beverages displayed on the product label." OAL File No. 94-0224-03 E (Feb. 16, 1994).

COLORADO

No advertising rule.

Malt beverages containing not more than 3.2% alcohol by weight must so state on the container. Colo. Code Regs. § 46-112.3.

CONNECTICUT

No advertising rule.

Adopts "[r]egulations of the federal alcohol administration currently in effect relating to labeling. . . ." Conn. Agencies Regs. § 30-6-A35(m) (1976).

DELAWARE

No advertising rule.

Labels must conform with federal laws and regulations. Del. Alc. Bev. Control Comm. R. 13(b) (1992).

DISTRICT OF COLUMBIA

Prohibits any false use of words suggesting high alcohol content in beer advertising. D.C. Mun. Regs. tit. 23, § 1103.18 (1988).

Prohibits descriptive terms suggesting high alcohol content. D.C. Mun. Regs. tit. 23, § 910.3(b) (1988).

FLORIDA

Adopts federal regulations regarding advertising. Fla. Admin. Code § 61A-4.058(1).

Labels must meet all federal labeling requirements. Malt beverages containing not more than 3.2% alcohol by weight *may* disclose alcohol content or accurate information about such alcohol content. Fla. Admin. Code § 61A-4.006(1).

GEORGIA

No advertising rule.

No labeling rule.

HAWAII

No advertising rule.

Labels shall "conform in all respects to the then existing federal laws and regulations regarding such labels." Haw. Rev. Stat. § 281-74 (1992).

IDAHO

"Except as permitted by federal statute and regulations, there shall be no public advertisement or advertising of alcoholic liquors in any manner or form within the state of Idaho." 23-607 ¶ 7087.

No labeling rule.

ILLINOIS

Advertisements shall not refer to alcoholic content. Ill. Admin. Code tit. 11, § 100.50(b)(3) (1991).

"Federal Alcohol Administration Regulation No. 7 relating to the labeling of wine, distilled spirits and malt beverages (27 CFR 7, April 1993, not including any later amendments or editions), are hereby adopted and made a part of this Rule. . . ." Ill. Admin. Code tit. 11, § 100.70(b)(1) (1991).

INDIANA

It is unlawful to advertise the percentage of alcohol in beer. Ind. Code Ann. § 7.1-5-2-2 (Burns 1994).

Malt beverage labels may not show alcoholic content by percentage or by words indicating "potency" or "strength". Alc. Bev. Comm'n of Ind. Bull. 23 (Aug. 4, 1938).

IOWA

No advertising rule.

No labeling rule.

KANSAS

No advertising rule.

Cereal malt beverages containing no more than 3.2% alcohol by weight must so state on label. Kan. Admin. Regs. 14-6-4(4) (1992). Malt beverages containing 2% or less alcohol by weight may bear labels so stating. Kan. Admin. Regs. 14-2-16 (1992).

KENTUCKY

Prohibits any advertisement or label of a malt beverage "which refers in any manner to the alcoholic strength of the malt beverage" including "words or numerals likely to be considered a statement of alcoholic content, unless the words or numerals are adequately explained." Ky. Rev. Stat. Ann. § 244.520 (Michie 1993).

Statements of percent of alcohol by volume are permissible. Op. Ky. Atty. Gen. 94-50 (1994).

LOUISIANA

No advertising rule.

No labeling rule.

MAINE

Prohibits any advertisement of a malt beverage which refers in any manner to its alcohol. Maine Rev. Stat. 28-A § 711 (1994).

"This paragraph does not prohibit the inclusion of the alcoholic content of the malt liquor on the product label." *Id.* No labeling prohibitions.

MARYLAND

No advertising rule.

No labeling rule.

MASSACHUSETTS

No advertising rule.

"All malt beverages containing not more than three and two tenths percent of alcohol by weight shall be so labeled." Mass. Gen. Laws Ann. ch. 138 § 15 (1991). "Every manufacturer licensed by the Commission shall place on the brand labels all information required by Federal regulations." Mass. Regs. Code tit. 204, § 2.06(1) (1986).

MICHIGAN

Advertisements and labels must comply with federal law. Mich. Admin. Code r. 436.1303, 436.1611(1) (1993).

MINNESOTA

Advertisements of beer containing more than 3.2% alcohol by weight shall not contain statements of alcohol content. Minn. R. 7515.0750(C) (1985).

Malt beverages containing more than .05% but not more than 3.2% alcohol by weight must state they contain not more than 3.2% alcohol by weight on the container. Minn. R. 7515.1100 subp. 2 (1992).

Labels must otherwise comply with federal law unless inconsistent with Minnesota law. Minn. R. 7515.1080 (1992).

MISSISSIPPI

No advertising rule.

Prohibited to refer to alcohol content on label, except to indicate that beer contains less than 4% alcohol by weight (and thus in conformity with law prohibiting sale of beer exceeding 4% alcohol). Miss. Code Ann. § 27-71-509 (1989).

MISSOURI

In advertisements for malt beverages not more than 3.2% alcohol by weight, alcoholic content "shall be stated in the manner and form in which it appears on the label" of the beverages advertised. Mo. Code Regs. tit. 11, § 70-2.240 (1993).

Malt beverages not more than 3.2% alcohol by weight must so state on the label. Mo. Ann. Stat. § 312.310(2) (1994).

MONTANA

Regulations nos. 4, 5, and 7 . . . as set forth in 27 C.F.R., and amendments thereof and supplements

thereto are hereby adopted and are made part hereof as though fully set forth herein, as the regulations for the labeling and advertising of liquor (distilled spirits, wine, and malt beverages) sold within this state except insofar as the provisions of such regulations may be contrary to or inconsistent with the provisions of Montana law or regulations of the department." Mont. Admin. R. 42.13.221 (1993).

Alcoholic content by weight must be noted on labels of malt beverages containing more than 7% alcohol by weight. Mont. Admin. R. 42.13.201(2) (1993).

NEBRASKA

No advertising rule.

Disclosure of alcohol content on malt beverage labels not required. Neb. Admin. R. 227-LCC4-001.01B.

NEVADA

No advertising rule.

No labeling rule.

NEW HAMPSHIRE

"All liquor and beverage advertising, or any claims for liquor or beverage advertising shall conform with the standards set forth in regulations under the provisions of the FAAA." N.H. Rev. Stat. Ann. § 179.31(VI).

No labeling rule.

NEW JERSEY

No advertising rule.

"Federal regulations, as amended or supplanted from time to time, relating to labeling . . . of . . . malt

alcoholic beverages . . . are made a part hereof. . . ."
N.J. Admin. Code tit. 13, § 2-27.1 (1990).

NEW MEXICO

No advertising rule.

No labeling rule.

NEW YORK

No statement regarding alcohol content permitted in advertising, except beer containing less than 2.5% alcohol by volume may be advertised as "low alcohol" or "reduced alcohol". N.Y. Alco. Bev. Cont. Law § 84.6 (1994).

No statement regarding alcohol content permitted in labeling, except beer containing less than 2.5% alcohol by volume may be labeled "low alcohol" or "reduced alcohol". N.Y. Alco. Bev. Cont. Law § 84.6 (1994). Labeling of malt beverages must be in accordance with the FAAA and FAAA regulations. N.Y. Admin. Code tit. 9, § 84.1 (1994).

NORTH CAROLINA

Advertising (defined as excluding labels) "shall conform with the standards set forth in regulations under the provisions of the Federal Alcoholic Administration Act except where they conflict with the rules of the Commission." N.C. Admin. Code tit. 4, r.2S.1004(e).

Advertisements and labels shall not contain words such as "high test," "high proof," "full strength," "extra strong" or "similar descriptive terms." N.C. Admin. Code tit. 4, r.2S.1005(17). No further labeling rules.

NORTH DAKOTA

No advertising rule.

No labeling rule.

OHIO

No advertising rule.

No labeling rule.

OKLAHOMA

No advertising rule.

Label of malt beverage containing more than .5% alcohol by volume but not more than 3.2% alcohol by weight may not indicate the alcohol content, or suggest that content is more than 3.2% by weight, or include words such as "strong," "high test," "full strength." Okla. Stat. Ann. tit. 37, § 163.19(b) (1993).

OREGON

No advertising rule.

Alcohol content must be listed on label of beer containing more than 4% alcohol by weight. Or. Admin. R. 845-10-205(4) (1992).

PENNSYLVANIA

Prohibited to refer to alcoholic content in advertisement for any malt or brewed beverage. Pa. Cons. Stat. § 493(8) (1993).

Prohibited to refer to alcoholic content on label of any malt or brewed beverage. Pa. Cons. Stat. § 493(7) (1993).

RHODE ISLAND

No advertising rule.

No labeling rule.

SOUTH CAROLINA

No advertising rule.

Prohibited to sell beer "unless labeled in accordance with the provisions of the Federal Alcoholic Administration Act and rules and regulations promulgated thereunder." S.C. Code Ann. § 61-13-800 (Law. Co-op. 1991).

SOUTH DAKOTA

No advertising rule.

"Compliance with the uniform labeling regulations established by the federal secretary of the treasury is in compliance with the labeling requirements of this chapter." S.D. Codified Laws Ann. § 39-13-11 (1993).

TENNESSEE

No advertising rule.

No labeling rule.

TEXAS

Advertising alcoholic content of malt beverages prohibited. Tex. Admin. Code tit. 16, § 45.90(c) (1991); Tex. Alco. Bev. Code § 108.01(a)(4) (1994).

Prohibition against labeling alcohol content of malt beverages repealed by Law 1993, H.B. 1445, approved June 19, 1993, eff. Sept. 1, 1993.

UTAH

Federal labeling and advertising regulations are adopted and incorporated by reference to regulate the labeling and advertising of alcoholic beverages sold within the state, except where the provisions of the federal regulations may be contrary to or incon-

sistent with the provisions of Utah law, or rules of the commission. Utah Admin. R. 96-1-7(2)(d) (1992).

VERMONT

"Federal regulations relating to the advertising" of malt beverages "promulgated under" the FAAA "as now existing or as amended in the future, are hereby adopted as part of this regulation. . . ." Vt. Admin. Comp. Liquor Control Board Reg. "Advertising" § 1 (1993).

No labeling rule.

VIRGINIA

Advertising may not refer to intoxicating effect of alcohol beverages. VR 125-01-2, § 1 (1994). No prohibition of alcohol content disclosures in advertising. "All beer sold in the Commonwealth shall conform with regulations adopted by the appropriate federal agency, relating to labels, definitions and standards of identity. Applicants shall submit a certified copy of the approval of the label by such federal agency." VR 125-01-4, § 5(A)(3) (1994).

WASHINGTON

Retailers who offer for sale both malt beverages under 4% alcohol by weight and over 4% alcohol by weight, packaged identically, must separate the two strengths in their displays and identify by point-of-sale advertising which is the higher strength and which is the lower strength. Wash. Admin. Code § 314-52-010(4) (1994).

No labeling rule.

WEST VIRGINIA

No advertising rule.

No labeling rule.

WISCONSIN

No advertising rule.

Requires compliance with federal labeling requirements. Wis. Admin. Code § (Dep't of Revenue) 7.21 (1991).

WYOMING

Federal regulations relating to the advertising of alcoholic beverages promulgated under "the FAAA" are adopted as part of these rules to the same extent as if set forth and shall govern the advertising of alcoholic beverages . . . in Wyoming." Wyo. Liquor Comm., Chap. II, § 8(a) (1985).

No labeling rule.

Generally Brewers May Advertise Alcohol Content, But Not Disclose It On Labels				Generally Brewers May Neither Advertise Nor Label Alcohol Content	
<i>State: No Advertising or Label Prohibitions</i>	<i>State: No Advertising Prohibitions, Some Labeling Requirements¹</i>	<i>State: No Advertising Prohibitions, Limited Labeling Prohibition</i>	<i>State: No Advertising Prohibitions, Federal Label Rule Incorporated</i>	<i>State Advertising and Labeling Prohibitions</i>	<i>State Advertising Prohibitions But No State Labeling Prohibition</i>
Alaska	California	Mississippi	Alabama	Florida ²	Arkansas ³
District of Columbia ⁴	Colorado	Oklahoma	Arizona	Illinois	Idaho
Georgia	Kansas		Connecticut	Indiana	Maine
Iowa	Massachusetts		Delaware	Michigan ²	New Hampshire ²
Kentucky	Missouri		Hawaii	Minnesota	North Carolina ^{2,4}
Louisiana	Oregon		New Jersey	Montana ²	Texas
Maryland			South Carolina	New York	Vermont ²
Nebraska			South Dakota	Pennsylvania	Wyoming ²
Nevada			Virginia	Utah ²	
New Mexico			Wisconsin		
North Dakota					
Ohio					
Rhode Island					
Tennessee					
Washington					
West Virginia					

1. Colorado, Kansas, Massachusetts, and Missouri require beer labels to disclose some alcohol content information at low end of spectrum; Oregon requires beer labels to disclose alcohol content at middle or high end. California also requires high strength malt beverages to carry names other than "beer."

2. State adopts federal law governing advertising of malt beverages generally. Because this may constitute state incorporation of substantive restrictions, it is included as a state with such restrictions.

3. Arkansas requires malt beverage labels to disclose when alcohol content exceeds 5% by weight.

4. State prohibits descriptive terms in advertising and on labels but not factual statements of alcohol content.

(14)
No. 93-1631

In the Supreme Court of the United States

OCTOBER TERM, 1994

FILED
OCT 17 1994

OFFICE OF THE CLERK

LLOYD BENTSEN, SECRETARY OF THE TREASURY,
PETITIONER

v.

COORS BREWING COMPANY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

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REPLY BRIEF FOR THE PETITIONER

1. Coors asserts (Resp. Br. 11) that there is “nothing” in the text or history of the Federal Alcohol Administration Act (FAAA), ch. 814, 49 Stat. 977, to show that Congress enacted the labeling restriction in 27 U.S.C. 205(e)(2) to curb strength wars among malt beverage producers. According to Coors, “[t]he *only* basis for the labeling provision that can be gleaned from the legislative history is a concern that alcohol content labels on malt beverages might be misleading.” Resp. Br. 15; see also Amicus Br. of Beer Inst. 15 & n.8. That is incorrect. The text and history of the FAAA make clear that the labeling restriction was enacted to prevent malt beverage producers from competing on the basis of high alcohol content.

The text of Section 205(e) shows that Congress’s purpose was not limited to preventing malt beverage alcohol content

statements that are misleading. Subsection (e)(1) of Section 205 authorizes the Secretary of the Treasury to promulgate regulations prohibiting "such statements [on labels] * * * as the Secretary * * * finds to be likely to mislead the consumer." 27 U.S.C. 205(e)(1). The prohibition against alcohol content statements on malt beverage labels, however, is not left as a subject for regulation under subsection (e)(1). It is specifically dealt with in a separate provision: subsection (e)(2). Subsection (e)(2), moreover, prohibits *all* alcohol content statements on malt beverage labels, not just those "likely to mislead the consumer."

The legislative history of the FAAA shows that Congress prohibited all malt beverage alcohol statements, regardless of their accuracy, in order to prevent competition among malt beverage producers on the basis of high alcohol strength—*i.e.*, to prevent strength wars. The House committee report on the bill that became the FAAA expressed the judgment that "[m]alt beverages should not be sold on the basis of alcohol content." H.R. Rep. No. 1542, 74th Cong., 1st Sess. 12 (1935). The report explained that the sale of malt beverages on the basis of high alcohol content had resulted in "unfair competition" that had caused "[l]egitimate members of the industry * * * [to] suffer[.]" *Ibid.* The report accordingly concluded that "the prohibition of all such statements" was necessary, "*irrespective of their falsity*," to protect "the interest of the consumer and the promotion of fair competition." *Id.* at 12-13 (emphasis added). The prohibition of malt beverage alcohol content statements was accordingly included in Section 205 as one form of "unfair competition" that, as the title of Section 205 indicates, is proscribed by that provision. See FAAA § 5, 49 Stat. 981; see also *Fedway Assocs., Inc. v. United States Treasury, Bureau of Alcohol, Tobacco & Firearms*, 976 F.2d 1416, 1420 (D.C. Cir. 1992) (interpreting FAAA provision in light of its title).

As we explain in our opening brief, extensive evidence of the "unfair competition" described in the House report was presented at the hearing on the labeling regulations proposed by the Federal Alcohol Control Administration (FACA) pursuant to the Executive Order that, in the wake of the repeal of Prohibition, had extended the code system governing the alcoholic beverage industry under the National Industrial Recovery Act. See U.S. Br. 7-9. Although Coors criticizes the government's reliance on the FACA hearing on the ground that the FACA regulations "were *replaced* by the FAAA" (Resp. Br. 12), that criticism is unfounded. The House and Senate committee reports stated that, with specified exceptions (none of which included the labeling and advertising restrictions), the bill that became the FAAA "incorporate[d] the greater part of the system * * * enforced by the Government under the codes." H.R. Rep. No. 1542, *supra*, at 4; S. Rep. No. 1215, 74th Cong., 1st Sess. 3 (1935); see also *Hearings on H.R. 8870 Before the Senate Comm. on Finance*, 74th Cong., 1st Sess. 9 (1935) (statement by FACA Chairman that "advertising control" of alcoholic beverage industry was "highly successful" under the code system and that "the same result would follow from this bill").¹

In sum, the text and history of the FAAA reflect Congress's determination that beer companies were competing on the basis of high alcohol content, that such competition was "unfair" and adverse to "the interest of the

¹ Coors also errs in asserting (Resp. Br. 14) that the testimony at the FACA hearing regarding strength wars was limited to "isolated remarks by one witness," Ralph W. Jackman. See U.S. Br. 7-8 (discussing testimony of George McCabe, counsel to Brewers Code Authority, presenting views that were "fairly representative of the general sentiment of the industry"); see also, *e.g.*, *Hearing Before the FACA With Reference to Proposed Regulations Relative to the Labeling of Products of the Brewing Industry* 59 (Nov. 1, 1934) (testimony of Alexander H. Bell about a brewer who found that "in order to meet competition it was necessary to increase the alcoholic content of the beer to some extent").

consumer,” and that a prohibition on alcohol content statements in malt beverage labeling and advertising would prevent such unfair competition. Although Congress did not set forth those determinations in separate statutory findings, it was not required to do so. *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2471 (1994) (“Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review.”). Moreover, because the congressional determinations underlying the labeling and advertising restrictions on malt beverage alcohol statements concern “legislative,” as distinguished from “adjudicative,” facts, they are entitled to substantial deference. See, e.g., *Lockhart v. McCree*, 476 U.S. 162, 168 n.3 (1986) (citing *Dunagin v. City of Oxford*, 718 F.2d 738 (5th Cir. 1983) (plurality opinion of Reavley, J.) (upholding against First Amendment challenge prohibition of most forms of signs advertising alcohol), cert. denied, 467 U.S. 1259 (1984)).

2. In this Court, as in the court of appeals, Coors does not squarely challenge our submission that, at the time of its enactment, the labeling restriction in Section 205(e)(2) (as well as the advertising restriction in Section 205(f)(2)) directly advanced the government’s substantial interest in preventing strength wars among beer companies—and therefore satisfied the third part of the *Central Hudson* test. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 566 (1980); U.S. Br. 25-26. Instead, Coors, like the court of appeals, relies on supposed changes in the malt beverage market since Section 205(e)(2) was enacted. Resp. Br. 17-19. Especially in light of the distinct constitutional foundation that the Twenty-first Amendment continues to furnish for regulation of the sale of alcoholic beverages, the burden properly lies with Coors to show that labeling restrictions that were valid at the time they (and the Twenty-first Amendment) were adopted can no longer

reasonably be regarded as furthering a substantial governmental interest. This Coors has failed to do. In any event, Coors’ reliance on asserted changes in the malt beverage market is misplaced.²

a. Coors’ primary argument is that there is “no evidence” that alcohol content statements in malt beverage labeling and advertising would lead to strength wars, because “the high-strength brews do not have the same popular appeal as the low-strength and the light beers.” Resp. Br. 17. That argument is flawed.

The flaw in Coors’ argument is most apparent when viewed against Coors’ own efforts to dispel the consumer perception that its beer contains less alcohol than other brands. The record shows that Coors distributed wallet cards to show that Coors beer contains as much, if not more, alcohol than competing brands. See U.S. Br. 14. The record also shows that Coors produced Coors Extra Gold, a higher alcohol beer, to increase its share of the market. See *id.* at 36. Finally, Coors sought approval from the Bureau of Alcohol, Tobacco and Firearms (ATF) to put alcohol content statements on its labels and in its advertising, and brought this action when approval was denied, in order to dispel the consumer perception that Coors beer is weak. *Ibid.*; see also Pet. App. 20a. Thus, Coors’ own conduct refutes its contention that

² Contrary to the contention of Coors and two of its amici, however, the government is not taking the position in this Court that changes in the malt beverage industry since 1935 are altogether irrelevant to the constitutionality of the labeling restriction. See Resp. Br. 10; Amicus Br. of Beer Inst. 15-17; Amicus Br. of U.S. Tel. Ass’n, *et al.* 4. For example, changes in brewing technology plainly may be relevant to the continued force of the concern expressed in the legislative history of the FAAA that the alcohol content of malt beverages was, at that time, difficult to measure. As we explain in our opening brief, our challenge to the judgment below is based, among other things, on the fact that the Tenth Circuit ignored the historical evidence underlying the labeling restriction and focused exclusively on perceived changes in the industry. U.S. Br. 29.

beer companies would not compete on the basis of high alcohol content if the advertising and labeling restrictions were struck down.³

Coors' reliance on the current consumer preference for low-alcohol beers is flawed at a more fundamental level as well. It assumes that the current preference has nothing to do with the advertising and labeling restrictions. Common sense, however, points to a contrary conclusion. As we discuss in our opening brief, it is obvious that the restrictions effectively prevent consumers from selecting beer on the basis of high alcohol content. U.S. Br. 26-27. At the same time, ATF's regulations permit consumers to choose a beer on the basis of its low alcohol content. See *id.* at 6. It is logical to conclude that this state of affairs has encouraged the

³ Coors argues that "[t]he net effect of the federal prohibition, with respect to Coors, is that consumers are drinking stronger beers than they think." Resp. Br. 19 n.19. That argument attempts to divert attention from Coors' own conduct, which demonstrates Coors' belief that it will sell more of its beer if it can persuade people that its beer is as strong as other brands. This Court has relied on similar conduct by litigants in finding that a commercial speech restriction satisfies the "directly advances" part of the *Central Hudson* test. See U.S. Br. 36 n.30. Moreover, the evidence in the record shows that other beer companies share Coors' belief that they will suffer in the marketplace if consumers believe that their brand has less alcohol than the competition. See, e.g., Deposition of Lutz E. Issleib 66 (statement of chairman and chief executive of Pabst Brewing Company that "I play follow the leader" with respect to alcohol content of its products); J.A. 127, 267, 352; see also Amicus Br. of Center for Science in the Public Interest 16 (quoting statement by Issleib, upon learning that competitor's brand of "ice" beer was selling because of its high alcohol content: "So I immediately called Milwaukee and said, Add the alcohol! Let's beef it up. They got 5.65 [% alcohol by volume], so mine is 5.7."); see also Suein L. Hwang, *Miller Brewing Gets Heat for New Ice Beer Ads*, Wall St. J., Oct. 12, 1994, at B11 (reporting statement by Anheuser-Busch official that "some brewers appear to be marketing ["ice" beers] on the basis of their allegedly higher strength.").

consumption of low-alcohol beer compared to that of high-alcohol beer.

Furthermore, Coors' reliance on the current consumer preference for low-alcohol beer misapprehends the "directly advances" part of the *Central Hudson* test. Coors erroneously assumes that, under the "directly advances" inquiry, the government must show that, in the absence of the restrictions, *most* people would select beer on the basis of high alcohol content. See Resp. Br. 23-24.⁴ It is sufficient, however, that enough people would do so to cause beer companies to compete on the basis of high alcohol content. See *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993), discussed in U.S. Br. 32-33 & n.25.

The government made such a showing here. As discussed in the government's opening brief, the evidence shows that Coors and other companies have promoted their beer on the ground that it contains as much or more alcohol than competing brands. U.S. Br. 14. The evidence also shows that competition in the malt liquor segment of the market is intense and has been marked by violations of the labeling and advertising restrictions. *Ibid.*; see also *id.* at 36.⁵ Finally, Coors' own expert admitted that, if the restrictions are struck

⁴ To argue otherwise would trap Coors in an obvious contradiction. Coors repeatedly asserts that, in the absence of the restrictions, some people would select a beer based on its *low* alcohol content. See, e.g., Resp. Br. 4, 7, 17-19, 33. Coors thus cannot reasonably dispute that, in the absence of the restrictions, other people would select a beer based on its *high* alcohol content.

⁵ Coors errs in suggesting (Resp. Br. 5, 18) that the violations in the malt liquor segment of the market all concerned "descriptive," as opposed to numerical, statements of high alcohol content. See, e.g., J.A. 207-208, 325. Moreover, as explained in our opening brief, the fact that most such violations have involved descriptive statements signifies only that beer companies cannot circumvent the prohibition of numerical alcohol content statements as easily as the prohibition of descriptive alcohol content statements. See U.S. Br. 33; see also J.A. 102.

down, beer companies will probably produce more high-alcohol beers. J.A. 136-149.

b. Coors' challenge is not supported by "[e]mpirical evidence from the many states and countries that permit or require alcohol content labeling on malt beverages." Resp. Br. 20 (italics omitted). As we explain in our opening brief, alcohol content statements are prohibited on malt beverage labels, at least under certain circumstances, in every State and the District of Columbia; no State has an across-the-board rule that permits, much less requires, all malt beverage labels to include alcohol content statements. U.S. Br. 9-11. Thus, the absence of strength wars in the States suggests that the federal labeling restrictions, in tandem with state laws, have been effective.⁶

The evidence concerning other countries, construed most favorably to Coors, is inconclusive. Although Coors argues that only the evidence that favors its position should be accorded significance, it recognizes that there is evidence to

⁶ Coors correctly notes (Resp. Br. 31 n.31, 2a, 5a, 10a) that, as a result of recent legislative or regulatory changes, four States listed in our opening brief (U.S. Br. 10 n.7, 11 n.10) as having state-imposed prohibitions against alcohol content statements on malt beverage labels—California, Texas, Maine, and Kentucky—have eliminated those prohibitions. Cal. Code Regs. tit. 4, § 130 (1994); Tex. Alco. Bev. Code Ann. § 101.41 (West 1994); Me. Act of Apr. 20, 1994, ch. 730, § 711, 1994 Me. Legis. Serv. CH. 730 (S.P. 614) (L.D. 1712) (West); Ky. Rev. Stat. Ann. § 244.520 (Michie/Bobbs-Merrill 1994). In addition, one State listed in both Coors' brief and our brief (Resp. Br. 9a; U.S. Br. 10 n.7) as prohibiting such statements, Pennsylvania, has recently repealed that prohibition. Pa. Act No. 80 (Oct. 5, 1994). It appears that the elimination of state restrictions in at least two of those States was prompted in part by the district court's decision in this case striking down the federal labeling restriction. See Statement of Cal. Dep't of Alco. Bev. Contr. (copies lodged with the Clerk of this Court); Ky. Off. of the Att'y Gen., OAG 94-50 (July 18, 1994), 1994 WL 400864 (KY-AG database). In any event, because none of those five States *requires* alcohol content statements on malt beverage labels, such statements are prohibited by the federal labeling restriction.

the contrary. Compare Resp. Br. 20 & nn.21-22 (citing evidence about Canada and the United Kingdom to support its position) with *id.* at 21 n.22 ("no relevant conclusion can be drawn" from the evidence regarding those countries that favors government's position). Indeed, Coors' expert cast doubt on the relevance of all such evidence when he admitted that "beer, more than most categories, is very national." J.A. 172.

c. Coors asserts that ATF "does not believe [the federal labeling restriction] serves the asserted interest." Resp. Br. 21 (italics omitted). ATF has made clear, however, that it believes that the labeling restriction is constitutional. See 58 Fed. Reg. 21,228 (1992). Moreover, although ATF has recommended to Congress that it change the restriction, that recommendation reflects the agency's view that the recommended changes involve policy (not constitutional) issues that are for Congress (not the courts) to resolve.⁷

As we explain in our opening brief, however, Congress has revisited this issue on several occasions and has declined to enact bills that would repeal the labeling restriction in Section 205(e)(2). See U.S. Br. 30 n.23. At the same time, it has enacted legislation requiring health warnings in alcoholic beverage labeling and advertising. *Id.* at 37, 40; see also Amicus Br. of Wine Inst. 8 (citing legislative material as evidence that Congress has "encouraged" a "[r]ethinking [of] the government's policy in this area"). Under those circumstances, ATF's views plainly do not support the conclusion that *Congress* no longer believes that the labeling restriction serves a substantial governmental purpose.

d. Coors argues that the labeling restriction in Section 205(e)(2) is irrational in light of other provisions that require statements of alcohol content on the labels of distilled spirits

⁷ One of respondent's amici likewise believes that "the question of alcohol labeling" is one that "Congress should revisit." Amicus Br. of Public Citizen 6 n.1.

and of wine that contains more than 14% alcohol by volume. Resp. Br. 25. That argument is without merit.

This Court rejected a similar argument in *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986). There, a tourism company argued that it was irrational for Puerto Rico to ban casino-gambling advertising directed at residents of Puerto Rico "because other kinds of gambling * * * may be advertised to the residents of Puerto Rico." *Id.* at 342. The Court rejected that argument in light of the history of other kinds of gambling, which, the Court explained, justified the legislature's conclusion that "the risks associated with casino gambling were significantly greater than those associated with the more traditional kinds of gambling." *Id.* at 343.

Historical considerations similarly justify Congress's distinctive treatment of alcohol content statements in the labeling and advertising of malt beverages. At the time of the FAAA's enactment, the evidence of unfair competition on the basis of high alcohol content concerned only the malt beverage industry. See U.S. Br. 6-9, 28; see also pp. 2-4, *supra*. That evidence justified Congress's conclusion that the risk of strength wars among malt beverage brewers was more significant than the risk of such wars among producers of other alcoholic beverages. That conclusion continues to be justified by, *inter alia*, evidence that beer is the drink of choice among underage drinkers and young adults, for whom alcohol abuse poses a particularly grave risk. See Amicus Br. of Center for Science in the Public Interest 9-10; Amicus Br. of Council of State Gov'ts, *et al.* 17 n.6.⁸

⁸ There is no merit to Coors' other arguments in support of its challenge to the rationality of the labeling restriction. Coors argues (Resp. Br. 26) that the restriction is irrational in light of ATF's failure to prohibit use of the term "malt liquor," which connotes high alcohol content. ATF advises us, however, that it has not adopted such a prohibition because it would be difficult to enforce, given the longstanding and widespread use of the term

3. Coors does not dispute our submission that Congress intended the FAAA's labeling and advertising restrictions to operate in tandem with and facilitate the regulation of alcohol by the States. See U.S. Br. 5-6, 21-22 & n.17. Instead, Coors asserts that the government is barred from making that submission because it was not raised below. Resp. Br. 28. That assertion is incorrect, as the government explained when Coors made the same assertion in opposing the government's petition for a writ of certiorari in this case. See Br. in Opp. 15 n.7; Reply 3 n.1.⁹ Coors also contends (Resp. Br. 31)

"malt liquor," and would probably only lead beer companies to devise new terms for high-strength beers. Coors next argues (*id.* at 26-27) that it makes no sense for the labeling restriction to apply unless a State requires the disclosure of alcohol content on malt-beverage labels, while the advertising restriction does not apply unless a State imposes similar restrictions on intrastate beer. For one thing, it is too late for Coors to challenge the government's longstanding view that the labeling restriction applies in States that have not enacted similar restrictions as a matter of state law, see *e.g.*, Rev. Rul. 62-1962-1 C.B. 362; Coors admits that it did not advance such a challenge below. Resp. Br. 2 n.3. Nor is the issue properly before the Court merely because it is addressed in two of the amicus briefs. Amicus Br. of Beer Inst. 9 n.4; Amicus Br. of Ass'n of Nat'l Advertisers, Inc. (ANA) 6-10; see, *e.g.*, *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981); *Bell v. Wolfish*, 441 U.S. 520, 531 n.13 (1979). The government's view has never been challenged in any prior case by any beer company or beer advertiser. In any event, it was not irrational for Congress to regulate labeling more stringently than advertising by having the federal labeling restriction apply in the absence of a State law to the contrary. Congress could reasonably determine that alcohol-content comparisons at the point of sale pose a greater threat than alcohol content disclosure in advertising. Although Coors disputes the reasonableness of such a determination by asserting that a beer company could put alcohol content statements on in-store advertising even if it could not put such statements on the labels of the beer itself (Resp. Br. 27), Coors does not suggest that such a practice is occurring, or permitted, anywhere in the country.

⁹ Coors and one of its amici also criticize the government's "eleventh hour" reliance on *Edge Broadcasting*. Resp. Br. 30; Amicus Br. of Beer Inst. 11. The criticism is unfounded. This Court's decision in *Edge Broadcasting*

that the federal restrictions do not facilitate the enforcement of state laws regulating alcoholic beverages. That contention does not withstand scrutiny.

Coors first argues that, because (in its view) the federal labeling and advertising restrictions do not advance Congress's purpose of preventing strength wars among malt beverage producers, they do not facilitate state laws having a similar purpose. Resp. Br. 28. We have shown above and in our opening brief that the premise of that argument is incorrect. See U.S. Br. 25-33; pp. 4-10, *supra*.

Coors next claims (Resp. Br. 29) to have difficulty understanding our "border crossing" argument." It is simple. As Coors recognizes (*id.* at 19 n.18, 35 n.37), many States limit the alcohol content of malt beverages sold within the State. See also J.A. 357-360. A resident of such a State must travel to a different State if he or she wants to buy higher-alcohol beer. Before doing so, however, the resident must determine which other State permits the sale of higher-alcohol beer. The federal labeling and advertising restrictions generally prevent the resident from making that determination. They accordingly give effect to the State's judgment regarding the maximum alcohol content appropriate for its citizens.¹⁰

was not issued until after the government had filed its opening and reply briefs in the Tenth Circuit and that court had heard oral argument in this case. On the same day that this Court issued its decision in *Edge Broadcasting*, the government advised the Tenth Circuit of that decision in a letter submitted pursuant to Fed. R. App. P. 28(j) and thereafter cited the decision in its rehearing petition (at 11) to the Tenth Circuit in this case.

¹⁰ Coors dwells at some length on the wide variety of state laws regarding the labeling and advertising of malt beverages to show that some States have taken approaches to the disclosure of malt beverage alcohol content that reflect a policy of disclosure in certain circumstances. See Resp. Br. 30-31 & n.31, 34 n.35, 35 n.37. That showing confirms that the federal labeling and advertising restrictions have permitted state experimentation and diversity in this area, and is thus consistent with Congress's intention in enacting the FAAA "to supplement legislation by

Coors also argues (Resp. Br. 29) that the federal restrictions will not prevent citizens of one State from finding out the alcohol content of the beer sold in another State if the latter State has overridden the federal restrictions. That does not mean, however, that the restrictions fail directly to advance Congress's goal of preventing strength wars. Rather, it shows that the restrictions were also designed to accommodate the matrix of state laws that existed both when the FAAA was enacted and now. Coors, like the party challenging the federal restriction on commercial speech in *Edge Broadcasting*, ignores the "congressional policy of balancing the [differing] interests" of the States. 113 S. Ct. at 2704; see also Amicus Br. of Council of State Gov'ts 19.¹¹

4. Coors contends (Resp. Br. 31-37) that the federal labeling restriction is not narrowly enough tailored to achieve its purpose. At the outset, Coors argues (*id.* at 31) that, in reviewing the fit between the labeling restriction and the purposes underlying it, the Court should apply a stricter standard than the "reasonable fit" standard required under

the States to carry out their own policies." 79 Cong. Rec. 11,714 (1935) (remarks of Rep. Cullen); see also *id.* at 11,723 (remarks of Rep. Celler) (describing variety of state laws on alcoholic beverages); see also U.S. Br. 21 n.17 (citing other portions of debate reflecting intention to enhance ability of States to regulate alcoholic beverages).

¹¹ Coors points out (Resp. Br. 30) that whereas the federal ban on lottery advertising at issue in *Edge Broadcasting* applied only in States that themselves banned lotteries, the federal labeling restriction at issue here applies unless a State enacts a law requiring alcohol content statements on malt beverage labels. That difference does not make *Edge Broadcasting* inapposite. It merely reflects that Congress structured the two statutes differently, taking account of the nature of the commercial activity to be regulated. Thus, the FAAA was shaped, as the congressional debate reveals, by Congress's judgment that "[t]he liquor industry is too big and the constitutional and practical limitations on the States are so considerable that they alone cannot do the whole job." 79 Cong. Rec. 11,714 (1935) (remarks of Rep. Cullen).

the fourth part of the *Central Hudson* test. See also Amicus Br. of Public Citizen 12.¹² Coors' argument rests on the erroneous assertion that the labeling restriction is "a categorical prohibition" against the disclosure of the alcohol content of malt beverages. Resp. Br. 31. Elsewhere Coors recognizes that it and other beer companies may disclose the alcohol content of their beer "as long as that information is not on a label or in an advertisement," *id.* at 22, and in States that require such disclosure.¹³ Because this case does not involve "the government's power to compel total silence" (*id.* at 9 n.5), Coors' strict scrutiny argument is without merit.¹⁴

¹² One of Coors' amici, the Washington Legal Foundation (WLF), similarly argues that the Court has applied strict scrutiny to laws that "suppress[] * * * accurate, factual information on the ground that its dissemination will allegedly impair the achievement of governmental objectives." Amicus Br. of WLF 3; see also *id.* at 4. That argument cannot be reconciled with this Court's application of the *Central Hudson* test, rather than a strict scrutiny standard, in *Posadas* and *Edge Broadcasting*.

¹³ Moreover, factual news reporting about the alcohol content of malt beverages is not prohibited under ATF regulations (J.A. 215), contrary to the suggestion of amicus WLF (see Amicus Br. of WLF 13, 15). Nor are "statements on the health benefits of moderate drinking" (Amicus Br. of Wine Inst. 2), unless they are made in connection with advertising and promotion (see *id.* at 6-7).

¹⁴ Coors also argues that strict scrutiny is appropriate because the FAAA was enacted before commercial speech was accorded First Amendment protection. Resp. Br. 32. That argument cannot be reconciled with *Edge Broadcasting*, in which this Court applied the *Central Hudson* test to uphold a federal statute enacted prior to this Court's modern commercial speech jurisprudence. See *Edge Broadcasting*, 113 S. Ct. at 2701 (reviewing lottery statute as amended in January 1975, see Act of Jan. 2, 1975, Pub. L. No. 93-583, § 1, 88 Stat. 1916, prior to *Bigelow v. Virginia*, 421 U.S. 809 (1975), which was identified in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 (1981), as the earliest decision of this Court foreshadowing modern commercial speech doctrine); see also *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 759-760 (1976).

Likewise without merit is Coors' argument that Congress could have achieved its goals by limiting the alcohol content of malt beverages instead of restricting alcohol content statements in the labeling and advertising of such beverages. Resp. Br. 35-36. As we explain in our opening brief, Congress reasonably could have concluded that a federal limit on alcohol content would have interfered with the States' authority to regulate alcoholic beverages to a greater extent than do the federal labeling and advertising restrictions. U.S. Br. 24-25. Coors acknowledges as much when it asserts that authority over the labeling of alcoholic beverages does not "implicate the 'core § 2 power' conferred [upon States] by the Twenty-first Amendment." Resp. Br. 44 (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713 (1984)).¹⁵ Moreover, contrary to Coors' assertion, labeling restrictions do occupy an important place in the regulation of alcoholic beverages under the Twenty-first Amendment. See *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion).

¹⁵ Coors therefore errs when it attempts to distinguish this case from *Posadas* on the ground that "in *Posadas*, it was undisputed that there was no direct regulation of conduct that could have effectively accomplished the government's purposes," because "[p]rohibiting casino gambling altogether would have frustrated the government's pursuit of tourist income." Resp. Br. 36 n.39. So too here, a federal limit on the alcohol content of malt beverages would have frustrated Congress's purpose of facilitating, rather than displacing, state laws regulating alcohol. Coors argues, however, that Congress could have enacted a federal limit on the alcohol content of malt beverages that could be overridden by state laws adopting higher or lower limits. *Id.* at 35. Coors does not explain why its proposal is not subject to the same criticism that Coors elsewhere levels against the federal labeling restriction: *i.e.*, that it "does not respect state authority" because it "affirmatively imposes a federal [restriction] unless the state enacts contrary legislation." *Id.* at 30. In any event, in the absence of labeling and advertising restrictions, Coors' proposal would likely encourage the sort of hazardous behavior addressed by the federal statute upheld in *South Dakota v. Dole*, 483 U.S. 203, 208-209 (1987) (interstate travel by young people to buy beer in states with lower legal drinking age).

Congress therefore cannot be faulted for pursuing an approach toward labeling in Section 205(e)(2) that respects State regulatory authority.

Coors also proposes several labeling and advertising restrictions that it claims are more narrowly tailored than the existing federal restrictions. Resp. Br. 36-37. As discussed in our opening brief, however, Congress reasonably could have concluded that those proposals would be less effective. See U.S. Br. 34-37. In particular, restrictions applicable only to malt beverages with the highest alcohol content, such as malt liquor, would not prevent the competition on the basis of high alcohol content that was shown to exist in other segments of the market. A restriction applicable only to descriptive statements of alcohol content, but not numerical statements, would not prevent violations of the sort that have already occurred. See p. 9 n.5, *supra* (violations have included numerical statements). Finally, a restriction applicable to forms of advertising other than labeling ignores that "[e]very labeling is in a sense an advertisement." *Kordel v. United States*, 335 U.S. 345, 351 (1948).¹⁶

There is no support for Coors' claim that the labeling and advertising restrictions prevent people from choosing a beer

¹⁶ Thus, Amicus WLF is misguided in its attempt to draw a sharp "contrast" between "advertising and promotion" and the "straightforward furnishing of an unvarnished fact" on a label. Amicus Br. of WLF 6 n.2; cf. Eben Shapiro, *Molson Ice Ads Raise Hackles of Regulators*, Wall St. J., Feb. 25, 1994, at B1 (describing television advertisements depicting malt beverage label with alcohol content statement). Another Coors' amicus, Public Citizen, proposes, as a more "narrowly tailored" alternative to the federal labeling restriction, a new tax on malt beverages tied to their alcohol content (a proposal to which Coors does not subscribe). See Amicus Br. of Public Citizen 13. The existence of such additional means of preventing strength wars, however, does not demonstrate that the means chosen are invalid. See *Posadas*, 478 U.S. at 344.

based on its low alcohol content. Resp. Br. 33.¹⁷ ATF regulations permit beers having the lowest alcohol content to be labeled as such. 27 C.F.R. 7.26(b)-(d).¹⁸ Moreover, consumers who want to find out the alcohol content of a beer may get that information from its producer. J.A. 214-215, 260.¹⁹

5. In *Posadas*, this Court distinguished between commercial speech concerning activity that "could have [been] prohibited * * * altogether" and commercial speech concerning activity that "was constitutionally protected and could not have been prohibited." 478 U.S. at 345. The Court indicated that restrictions on the first category should be reviewed under a less stringent standard than restrictions on the second. *Id.* at 345-346. The Court reasoned that "because the government could have enacted a wholesale prohibition of

¹⁷ As an initial matter, the assertions by Coors and its amici regarding the "danger[]" that a consumer who wants a low-alcohol beer will unwittingly choose a high-alcohol beer (see Resp. Br. 33-34; Amicus Br. of Public Citizen 6-7) are at odds with Coors' position elsewhere in its submission. Thus, Coors goes to great lengths to dismiss high-alcohol malt beverages as a "fringe product" that are readily identifiable by their "rougher and harsher" taste. Resp. Br. 18-19. Moreover, according to Coors, the alcohol content of "mainstream" malt beverages is kept low because the effect of alcohol upon taste "ensure[s] that any increases in alcohol content would be very slight." *Id.* at 19; see also J.A. 145 (testimony of Coors' expert that "mainstream" beer in U.S. is in "3.5 to 5.5[% alcohol content] bracket").

¹⁸ Although Coors suggests that the regulations may conflict with the FAAA (Resp. Br. 2 n.2), ATF reasonably construes the statute to prohibit only competition on the basis of *high* alcohol content. See 54 Fed. Reg. 3591 (1989).

¹⁹ Amicus WLF asserts that the "regulatory scheme seems well calculated to chill the speech" of producers asked to provide alcohol content information. Amicus Br. of WLF 7. To the contrary, ATF has and exercises the authority to provide guidance in this area. See Amicus Br. of Wine Inst. 7 (discussing ATF proposal to promulgate rules to provide guidance on health claims in advertising and labeling of alcoholic beverages).

the underlying conduct * * * it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand." *Id.* at 346; see also *Meyer v. Grant*, 486 U.S. 414, 424 (1988). Coors simply ignores that reasoning in contending that *Posadas* does not support a less stringent standard of review for commercial speech promoting an activity that could be prohibited altogether. Resp. Br. 38-39.²⁰

Coors errs in asserting that the application in this case of the less strict standard of review contemplated by *Posadas* would invite "judicial policy judgments about the social value of particular commercial activities." Resp. Br. 40. As this Court has recognized, the sale of alcohol has traditionally been subject to stringent regulation at both the state and federal level. See *Posadas*, 478 U.S. at 346; see also U.S. Br. 40-41 (citing cases). This case thus falls squarely within the reasoning of *Posadas*.²¹

²⁰ Nor can the reasoning of *Posadas* concerning the two types of commercial speech be dismissed as "dicta," as amici Beer Institute (at 19) and ANA (at 19) contend.

²¹ The standard of review under *Posadas* does not "count[] the government's interest in inhibiting socially harmful activity twice," as amicus Wine Institute claims (at 10). Instead, the *Posadas* standard recognizes that, with respect to commercial speech about certain activities, such as gambling and the sale of alcoholic beverages, the government has a particularly strong regulatory interest, commensurate with the particularly serious social harms those activities have traditionally been understood to cause. That recognition accords with other decisions of this Court that relate the appropriate standard of review to the nature of the speech at issue. Compare, e.g., *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 493 (1985) (applying strict scrutiny to restrictions on political speech by private persons, because such speech is at the "core" of the First Amendment), with *Board of Trustees v. Fox*, 492 U.S. 469, 478 (1989) (less stringent standard of review applies to commercial speech because it occupies a "subordinate position in the scale of First Amendment values").

6. The Constitution itself establishes the strength of legislative policy judgments regarding the sale and use of alcoholic beverages, for the Twenty-first Amendment "confer[s] something more than the normal state authority over public health, welfare, and morals." *California v. LaRue*, 409 U.S. 109, 114 (1972). It therefore is appropriate in this case to apply a less stringent standard of review than is normally applied to restrictions on commercial speech, based on *LaRue* and subsequent cases holding that laws within the ambit of the Twenty-first Amendment are entitled to an "added presumption in favor of the[ir] validity" when challenged under the Speech Clause of the First Amendment. *Id.* at 118. Because the federal labeling restriction facilitates the enforcement of such state laws, it is entitled to the added presumption of validity applied in *LaRue*. See U.S. Br. 44-45 & n.35.

Coors ignores the reasoning of *LaRue* by asserting that the regulation challenged there "was valid under the First Amendment, without regard to the Twenty-first Amendment." Resp. Br. 43; see also Amicus Br. of Wine Inst. 11-12.²² The Court in *LaRue* held that because the regulation was within the ambit of the Twenty-first Amendment, that Amendment "require[d]" (409 U.S. at 119) the application of a less stringent standard of review than would otherwise apply under *United States v. O'Brien*, 391 U.S. 367 (1968), to a restriction on expressive activity. The Court in *LaRue* accordingly

²² Coors attempts to distinguish *LaRue* on the ground that the regulation at issue in *LaRue* applied only to unprotected "conduct," whereas the legislation at issue here applies to pure "speech." Resp. Br. 43; see also Amicus Br. of WLF 17. That attempt is unavailing. The Court in *LaRue* determined that "at least some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression." 409 U.S. at 118. By the same token, the Court has recognized that commercial speech is "linked inextricably" with the commercial conduct it concerns. *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993) (quoting *Friedman v. Rogers*, 440 U.S. 1, 10 n.9 (1979)).

upheld the regulation under a standard that was plainly less stringent than the *O'Brien* test. 409 U.S. at 116 (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-488 (1955)).

Just as the *O'Brien* test was inappropriate in *LaRue*, the *Central Hudson* test is inappropriate here. See *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 537 n.16 (1987) (*O'Brien* and *Central Hudson* test were "substantially similar" as applied to challenged legislation); see also *Fox*, 492 U.S. at 478. To conclude otherwise would justify the invalidation of federal legislation that is necessary to, and designed to ensure, the effective enforcement of state laws regulating alcohol.

* * * * *

For the foregoing reasons, as well as those set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

OCTOBER 1994

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

LLOYD BENTSEN, SECRETARY OF THE
TREASURY, *et al.*,
v. *Petitioners,*

COORS BREWING COMPANY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS,
NATIONAL GOVERNORS' ASSOCIATION, NATIONAL
ASSOCIATION OF COUNTIES, NATIONAL LEAGUE
OF CITIES, U.S. CONFERENCE OF MAYORS, AND
INTERNATIONAL CITY/COUNTY MANAGEMENT
ASSOCIATION AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the
Amici Curiae

QUESTION PRESENTED

Whether section 5(e)(2) of the Federal Alcohol Administration Act, 27 U.S.C. § 205(e)(2), violates the First Amendment.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1631

LLOYD BENTSEN, SECRETARY OF THE
TREASURY, *et al.*,

v. *Petitioners,*

COORS BREWING COMPANY,
Respondent.

On Writ of Certiorari to the
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BRIEF OF THE COUNCIL OF STATE GOVERNMENTS,
NATIONAL GOVERNORS' ASSOCIATION, NATIONAL
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ASSOCIATION AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. To protect their citizens from the harms

caused by the sale and use of alcoholic beverages, the States have long exercised "something more than the normal state authority over public health, welfare, and morals." *California v. LaRue*, 409 U.S. 109, 114 (1972). Indeed, the States have exercised these powers since before the ratification of the Twenty-first Amendment. See, e.g., *Mugler v. Kansas*, 123 U.S. 623 (1887); *The License Cases*, 46 U.S. (5 How.) 504 (1847).

The misuse of alcohol remains a serious societal problem. Statistics for the year 1991 show that approximately twenty thousand traffic fatalities occurred in accidents in which a driver had ingested alcohol. U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1992* 355 (Table 3.119). Moreover, there were 3,176,004 arrests for alcohol related offenses, including 1,372,266 for driving under the influence. *Id.* at 457 (Table 4.29).

The States' interests in regulating the sale and use of alcoholic beverages and promoting temperance are plainly substantial. The maintenance of their authority to decide whether the labeling of alcohol content on malt beverages should be required or prohibited is a core concern of the States. Thus, while this case involves a challenge to a federal statute, an affirmation of the court of appeals' decision will undoubtedly prompt challenges to the numerous state laws which prohibit the labeling of alcohol content.

Amici have a manifest interest in the legal standard adopted by the Court and in ensuring that any opinion recognizes the broad powers of the States under the Twenty-first Amendment. Accordingly, *amici*

submit this brief to assist the Court in the resolution of this case.¹

SUMMARY OF ARGUMENT

1. The court of appeals' holding—that past evidence of strength wars (*i.e.*, competition by brewers for market share by increasing the alcohol content of their products) is insufficient to show that section 205(e)(2)'s alcohol content labeling prohibition "directly advances" the government's concededly substantial interest in preventing strength wars—is flawed in several respects. First, it is inconsistent with the Court's recognition that a legislature can rely on the experiences of other jurisdictions in deciding to regulate. See *City of Renton v. Playtime Theatres Inc.*, 475 U.S. 41, 50-52 (1986). It thus calls into question the authority of the States to rely on the evidence gathered by Congress in enacting section 205(e)(2) as justification for their own labeling prohibitions.

Moreover, the court of appeals' suggestion that past experience can no longer support the labeling prohibition amounts to nothing more than judges substituting their policy preferences for those of the legislature. It is the legislatures, not courts, which possess the institutional competence to assess the need to regulate the market.

Even if it is true, as the court of appeals concluded, that "brewers in the United States have no intention of increasing alcohol strength, regardless of labeling regulations, because the vast majority of consumers

¹ The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

... value taste and lower calories—both of which are adversely affected by increasing alcohol strength,” Pet. App. 8a, consumer preferences can, and do, change. Likewise, brewers’ “intentions” are hardly cast in stone. It defies credulity to suggest that if there was an increase in the number of drinkers who preferred higher alcohol content beers, segments of the brewing industry would not compete, as they did in the years following prohibition, for this share of the market. The potential costs of disregarding history are too great to allow courts, rather than legislatures, to serve as the proper forums for pleas that legislation no longer serves a valid and substantial governmental interest.

2. The States have a substantial interest in promoting temperance. See *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion). Alcohol is a dangerous substance which imposes an immense toll on society. An authoritative study estimates that “in 1988 approximately 15.3 million individuals in the United States over age 18 met criteria for a . . . diagnosis of alcohol abuse or dependence or both.” U.S. Department of Health and Human Services, *Eighth Special Report to the U.S. Congress on Alcohol and Health* 18 (1993). Moreover, in 1991 there were more than three million arrests for alcohol related offenses, including 1,372,266 for driving under the influence. U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1992* 457 (Table 4.29). Alcohol use is a significant factor in fatal traffic accidents; in 1991 nearly twenty thousand people lost their lives in this manner. *Id.* at 355 (Table 3.119). It is also a significant factor in accidental deaths caused by burns, falls and drownings. *Eighth Special Report*

at 237, 243. Studies have also shown alcohol use to be a significant factor in homicides and suicides. *Id.* at 234, 246.

3. As the foregoing demonstrates, the sale and use of alcoholic beverages causes substantial public harms. It was because of these public harms that the Twenty-first Amendment granted to the States broad authority to regulate the trade in alcoholic beverages. The Court has accordingly recognized that the Amendment “confer[s] something more than the normal state authority over public health, welfare, and morals.” *California v. LaRue*, 409 U.S. 109, 114 (1972). And while the Amendment does not “superse[] all other provisions of the United States Constitution in the area of liquor regulations,” *id.* at 115, “[t]he States enjoy broad power under . . . the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders.” *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984). Accordingly, state liquor control regulations “are supported by a strong presumption of validity and should not be set aside lightly.” *North Dakota*, 495 U.S. at 433 (plurality opinion) (citation omitted). Consistent with this principle, the Court, in reviewing state liquor control regulations which implicate First Amendment interests, has rejected higher level scrutiny in favor of the rational basis test. See *LaRue*, 409 U.S. at 113-14.

Labeling prohibitions satisfy this standard. As the court of appeals recognized, Congress enacted section 205(e)(2) because in the aftermath of the repeal of prohibition, the brewing industry engaged in strength wars in which “producers competed for market share by putting increasing amounts of alcohol in their beer.” Pet. App. 6a (citation omitted). The

record also contains evidence that manufacturers of malt liquors have competed for market share by touting the higher alcohol content of their products. *Id.* at 7a. This evidence provides a rational basis for concluding that federal and state prohibitions of statements of alcohol content on beer labels protect against the recurrence of strength wars.

4. *Amici* believe that the correct understanding of the Twenty-first Amendment is that the States were to have exclusive control over the liquor trade. See *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 334-40 (1964) (Black, J., dissenting); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 353-60 (1987) (O'Connor, J., dissenting). This case, however, does not present an appropriate occasion to revisit the holdings in these and other cases. Accordingly, because section 205(e)(2) merely serves to assist the States in the enforcement of their respective malt beverage labeling laws, it is a permissible exercise of Congress' commerce clause powers as construed by the Court's prior decisions. See, e.g., *Hostetter*, 377 U.S. at 332. As such, section 205(e)(2) is entitled to the "added presumption" of validity afforded state regulation under the Amendment. See *LaRue*, 409 U.S. at 118-19. Because state labeling prohibitions clearly satisfy rational basis review, section 205(e)(2) is likewise constitutional.

ARGUMENT

I. THE COURT OF APPEALS IMPROPERLY DISREGARDED EVIDENCE OF THE MARKETING OF MALT BEVERAGES BASED ON ALCOHOL CONTENT

The United States has demonstrated that section 205(e)(2)'s alcohol content labeling prohibition "directly advances" the concededly substantial governmental interest in preventing strength wars. See Pet. Br. 25-33; see also *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980). The United States has also demonstrated that the labeling prohibition is "not more extensive than necessary to serve that interest." See Pet. Br. 34-37; *Central Hudson*, 447 U.S. at 566. Because the United States has persuasively shown that the judgment below should be reversed, *amici* will not repeat its arguments concerning the court of appeals' misapplication of the *Central Hudson* test to section 205(e)(2). Nonetheless, because a decision by this Court to the contrary will undoubtedly prompt immediate challenges to the comparable statutes of many States, *amici* submit this brief to address other troubling features of the court of appeals' opinion, as well as the power of the States, under the Twenty-first Amendment, to prohibit statements of alcohol content on malt beverage labels.

1. Of grave concern is the court of appeals' holding that the labeling prohibition did not directly advance the government's interest given that court's own recognition that Congress enacted section 205(e)(2) on the basis of testimony "that labels displaying alcohol content resulted in a strength war wherein producers competed for market share by putting increasing amounts of alcohol in their beer," and "that

not disclosing the alcohol content on malt beverages would relieve marketplace pressures to produce beer on the basis of alcohol content, resulting over the long term in beers with a lower alcohol content." Pet. App. 6a (quoting *Coors I*, Pet. App. 17a-18a). By rejecting this evidence as insufficient to establish that the labeling prohibition "directly advances" the governmental interest in preventing strength wars, the court of appeals would apparently require each State to come forward with independent and current evidence that the "continued prohibition [of alcohol content on malt beverage labels] helps to prevent strength wars." Pet. App. 9a.

This reasoning is flawed in several respects. First, the court of appeals' rationale calls into question the authority of States to rely on the experience of other jurisdictions when regulating. The Court has recognized, however, that a legislative body can rely on the experience of other jurisdictions when regulating to protect its citizens from the harmful secondary effects of protected speech. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-52 (1986). As the Court noted in *Renton*, "The First Amendment does not require a city . . . to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51-52. The States should likewise be able to rely on the evidence gathered by Congress in enacting section 205(e)(2) as justification for their own labeling prohibitions.

2. Equally disturbing is the court of appeals' suggestion that the government's historical experience with the brewing industry can no longer support its alcohol content labeling prohibition. See Pet. App.

6a-8a. This reasoning amounts to nothing more than judges substituting their policy preferences for those of the legislature and ignores the lessons of history. It is truly an extraordinary step for the judiciary, given that the legislatures, not the courts, possess the competence to assess the need to regulate the markets.

The court of appeals concluded that strength wars will not recur because, in its view, "brewers in the United States have no intention of increasing alcohol strength, regardless of labeling regulations, because the vast majority of consumers . . . value taste and lower calories—both of which are adversely affected by increased alcohol strength." Pet. App. 8a. Contrary to the reasoning of the court of appeals, consumer preferences can, and do, change. Likewise, brewers' "intentions" are hardly cast in stone. It defies credulity to suggest that if there were an increase in the number of drinkers who preferred "high test" or high alcohol content beers, segments of the brewing industry would not compete, as they did in the years following the repeal of prohibition, for this share of the market. As Santayana wrote, "[W]hen experience is not retained . . . infancy is perpetual. Those who cannot remember the past are condemned to repeat it." 1 George Santayana, *The Life of Reason* 284 (1905). The potential costs of disregarding history are simply too great to allow courts, rather than legislatures, to serve as the proper forums for pleas that circumstances have so changed that legislation no longer serves a valid and substantial governmental interest. Cf. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (rejecting First Amendment and due process challenges to civil war era statute limiting attorneys' fees for veteran benefits claims). Institutionally,

legislatures, with their superior resources, are far more competent than courts to assess the validity of claims such as those raised by Coors.

Accordingly, where, as here, Congress's predictive judgment as to future industry behavior is based on past experience, a court must accord substantial deference to it even where the First Amendment is implicated. *See, e.g., Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 103 (1973) ("The judgment of the Legislative Branch cannot be ignored or undervalued simply because one segment of the [regulated industry] casts its claims under the umbrella of the First Amendment."). Here, both the brewing industry's post-prohibition history and the record evidence "that a number of manufacturers have tried to advertise malt liquor . . . to tout its alcohol strength," Pet. App. 7a, provide more than adequate evidentiary support for Congress' and the States' predictive judgments that labeling prohibitions are necessary to prevent future strength wars.

II. BECAUSE THE SALE AND USE OF ALCOHOLIC BEVERAGES IMPOSES AN IMMENSE TOLL ON SOCIETY, THE TWENTY-FIRST AMENDMENT GRANTS THE STATES BROADER THAN NORMAL AUTHORITY TO PROTECT PUBLIC HEALTH, WELFARE, AND MORALS

1. As Justice Stevens noted in the Court's most recent Twenty-first Amendment case, the States have a substantial interest in "promoting temperance and controlling the distribution of liquor." *North Dakota v. United States*, 495 U.S. 423, 439 (1990) (plurality opinion). Alcohol is a dangerous substance. Quite unlike the sale and use of most other products, the sale and frequent misuse of alcoholic beverages, including beer, imposes an immense toll on society. The

1988 Alcohol Supplement to the National Health Interview Survey "estimated that in 1988 approximately 15.3 million individuals in the United States over age 18 met criteria for a . . . diagnosis of alcohol abuse or dependence or both." U.S. Department of Health and Human Services, *Eighth Special Report to the U.S. Congress on Alcohol and Health* 18 (1993) (*Eighth Special Report*). Likewise, alcohol use by adolescents remains at high levels. A recent survey indicates that 90 percent of high school seniors have tried alcohol with 57 percent reporting use within the previous 30 days and "32 percent of high school seniors report[ing] occasions of heavy drinking (five or more drinks in a row) during the 2 weeks prior to the interview." *Id.* at 21.

Alcohol misuse imposes a substantial burden on the States' criminal justice systems. For example, a "conservative estimate" of the Department of Justice indicates that in 1991, there were 3,176,004 arrests for alcohol related offenses. U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1992* 457 (Table 4.29). These arrests included 1,372,266 for driving under the influence, 677,377 for drunkenness, 590,692 for disorderly conduct, 504,412 for liquor law violations, and 31,257 for vagrancy. *Id.*

Alcohol use remains a significant factor in fatal traffic accidents. Data for the year 1991 show that 38.5% of traffic fatalities occurred in accidents in which a driver was legally intoxicated; another 9.5% of traffic fatalities occurred in accidents in which a driver had ingested alcohol below the legal limit. *Id.* at 355 (Table 3.119). While alcohol related traffic fatalities appear to be declining, in 1991

nearly twenty thousand people lost their lives in this manner.² *Id.*

Alcohol use is also a significant factor in other deaths as well. A study of more than 100,000 deaths investigated by North Carolina's medical examiners in the years 1973-83 indicated that a positive blood alcohol content was found in approximately 63 percent of homicide victims and 35 percent of suicide victims. *Eighth Special Report* at 234. Blood alcohol content levels in excess of .10 (the legal level of intoxication in most States) were found in 52 percent of homicide victims and 27 percent of suicide victims. *Id.* Likewise, one study documented that 49 percent of convicted homicide offenders were under the influence of alcohol at the time of their crimes. *Id.* at 246. Another study indicates that 43 percent of fatalities caused by burns and 35 percent of fatalities caused by falls were alcohol related. *Id.* at 237. Studies further suggest that alcohol is a factor in "between 47 percent and 65 percent of adult drownings." *Id.* at 243.

2. As the foregoing demonstrates, while the sale and use of alcoholic beverages is generally legal throughout the United States, the misuse of alcoholic beverages causes substantial public harm. Because of these substantial harms, the sale and advertising of alcoholic beverages does not stand on the same footing as that of other goods and services. Indeed,

² Alcohol use is also a factor in many non-fatal crashes. A 1983 report of the National Highway Traffic Safety Administration noted that "[o]ver 650,000 persons per year are injured in alcohol-related crashes." U.S. Department of Transportation, National Highway Traffic Safety Administration, *A Digest of State Alcohol-Highway Safety Related Legislation* iii (1983).

it was because of these widely recognized harms that, in addition to repealing prohibition, the Twenty-first Amendment returned to the States the broad authority to regulate the trade in alcoholic beverages which they had been granted under the Wilson³ and Webb-Kenyon⁴ Acts. See David S. Versfelt, Note, *The Effect Of The Twenty-First Amendment On State Authority To Control Intoxicating Liquors*, 75 Colum. L. Rev. 1578, 1579-80 (1975).

Thus, shortly after the Twenty-first Amendment's ratification, this Court stated:

Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, [a state] may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them The state may protect her people against evil incident to intoxicants, and may exercise large discretion as to means employed.

Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138-39 (1939) (citations omitted). See also *North Dakota*, 495 U.S. at 432 (plurality opinion) (recognizing that "promoting temperance" and "ensuring orderly market conditions" fall "within the core of the State's power under the Twenty-first Amendment").

More recently, the Court has noted that the Twenty-first Amendment "confer[s] something more than the normal state authority over public health,

³ 26 Stat. 313 (1890).

⁴ 37 Stat. 699 (1913).

welfare, and morals.” *California v. LaRue*, 409 U.S. 109, 114 (1972); see also *City of Newport v. Iacobucci*, 479 U.S. 92, 94-95 (1986) (per curiam). To be sure, “[t]he reach of the Twenty-first Amendment is certainly not without limit.” *Id.* Thus, the Twenty-first Amendment does not “supersede[] all other provisions of the United States Constitution in the area of liquor regulations.” *LaRue*, 409 U.S. at 115; see also *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964). Nonetheless, “[t]he States enjoy broad power under . . . the Twenty-first Amendment to regulate the importation and use of intoxicating liquor within their borders.” *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984). Accordingly, state liquor control regulations “are supported by a strong presumption of validity and should not be set aside lightly.” *North Dakota*, 495 U.S. at 433 (plurality opinion); see also *LaRue*, 409 U.S. at 118-19.

Thus, in *LaRue* this Court overturned the decision of a three judge district court that a state prohibition of live sexual entertainment and films in establishments licensed to sell alcoholic beverages violated the First Amendment. See *id.* Significantly, the district court had held that the regulations did not satisfy the mid-level scrutiny approach for assessing the validity of the regulation of conduct which includes a communicative element. See *id.* at 113-14 (citing *United States v. O'Brien*, 391 U.S. 367 (1968)).⁵ Nonetheless, this Court held that notwith-

⁵ The means and ends prongs of the *O'Brien* test are similar to those of *Central Hudson*. Under *O'Brien*,

a government regulation is sufficiently justified if it . . . furthers an important or substantial governmental inter-

standing that the regulated conduct had a communicative element, *O'Brien's* mid-level scrutiny was too demanding a standard given the State's broader authority to regulate the sale and use of alcoholic beverages. See 409 U.S. at 116 (“[W]e do not believe that the state regulatory authority in this case was limited to . . . dealing with the problem it confronted within the limits . . . prescribed for dealing with some forms of communicative conduct in *O'Brien*.”).

Instead, the Court applied rational basis review to the regulation, noting that the State's conclusion “that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one.” *Id.* at 118; see also *id.* at 116. And in response to the contention that the regulations were not narrowly drawn (because the same results could be achieved by requiring the exclusion of intoxicated patrons), the Court stated that “wide latitude as to choice of means to accomplish a permissible end must be accorded the state agency that is itself the repository of the State's power under the Twenty-first Amendment.” *Id.* Because the State's regulations were not unreasonable, see *id.* (citing *Williamson v.*

est . . . and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377. Similarly, the *Central Hudson* test asks:

. . . whether the asserted governmental interest is substantial. If [so], we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

Lee Optical Co., 348 U.S. 483, 487-88 (1955)), and the Twenty-first Amendment "added [a] presumption in favor of [their] validity," the Court held that the regulations did not violate the First Amendment. *Id.* at 118-19.

LaRue establishes that the immense societal harms imposed by the misuse of alcoholic beverages justify a more deferential standard for reviewing the validity of state alcohol regulations that limit speech. The appropriate standard is not the mid-level scrutiny approach of *Central Hudson* but the less exacting scrutiny of rational basis review. Alcohol content labeling prohibitions meet this standard. As the court of appeals recognized, the record here "contains evidence that consumers who prefer malt liquor do so primarily because of its higher alcohol content and that a number of manufacturers have tried to advertise malt liquor" on the basis of alcohol strength. Pet. App. 7a. Thus, even if Congress and the States cannot rely on the wisdom acquired from observing the brewing industry's experience in the years immediately following the repeal of prohibition, this evidence of "a continuing threat of strength wars"—even if limited to only a segment of the market—establishes that high alcohol content is used in the marketing of malt beverages. Accordingly, this evidence provides a rational basis for concluding that the prohibition of statements of alcohol content on beer labels protects against the recurrence of strength wars.

It is, of course, plausible that if statements of alcohol content were permitted on beer labels, some consumers might use this information to purchase lower strength beers. See Pet. App. 37a. It is, however, equally plausible that some consumers would

use such information to purchase higher strength beers as they currently do in the malt liquor market, see *id.* at 7a, and as they actively did in the aftermath of the repeal of prohibition.⁶ See Office of General Counsel, Federal Alcohol Control Administration, *Legislative History of the Federal Alcohol Administration Act* 67 (1935). Under our constitutional system, the task of determining the need for regulation in the face of these competing views of consumer behavior is the province of legislatures. Cf. *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 464 (1981); *Vance v. Bradley*, 440 U.S. 93, 112 (1979); *Day-Brite Lighting v. Missouri*, 342 U.S. 421, 425 (1952). If Coors believes that labeling prohibitions are ill-advised or outdated, it has the right to present its arguments to Congress and the State houses.⁷

⁶ A recent survey indicates that heavy drinking (defined as five or more drinks per occasion on five or more days in the past month) is most prevalent among 18-34 year olds. U.S. Department of Health and Human Services, *Preliminary Estimates From The 1993 National Household Survey On Drug Abuse* 17 (1994). According to this survey, "10.4 percent of 18-25 year olds and 7.3 percent of 26-34 year olds report[ed] heavy drinking." *Id.* Correspondingly, statistics for the year 1989 indicate that while 18-34 year olds comprise only 38.5 percent of licensed drivers, they account for 65.4 percent of arrests for driving under the influence. *Sourcebook of Criminal Justice Statistics—1992* at 456 (Table 4.28).

⁷ As the court of appeals noted, Coors did not challenge 27 C.F.R. § 7.29(f) (1993), which prohibits, except where required by state law, labels such as "full strength," "high test," "extra strength," as well as other "similar words or statements likely to be considered as statements of alcoholic content." Pet. App. 7a-8a & n.5. It is, of course, entirely plausible that labels using these words, while descriptive, are nonetheless true statements of a particular beer's alcohol content. Coors' failure to challenge this regulation raises the

III. SECTION 205(e)(2) SHOULD RECEIVE THE PRESUMPTION OF VALIDITY AFFORDED STATE REGULATION UNDER THE TWENTY-FIRST AMENDMENT

As the foregoing demonstrates, state labeling prohibitions enacted pursuant to the Twenty-first Amendment need only satisfy rational basis review and are thus presumptively constitutional. *See LaRue*, 409 U.S. at 113-16. The question remains, however, whether the United States can properly invoke the presumption of validity afforded state regulation to sustain § 205(e)(2).

In *amici*'s view, the correct understanding of the federal government's power under the amendment is that expressed by Justice Black's dissenting opinion in *Hostetter*, *see* 377 U.S. at 334-40, and Justice O'Connor's dissenting opinion (which was joined by the Chief Justice) in *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 352-60 (1987). These opinions explain that Congress expressly rejected a proposed section which would have "granted the Federal Government concurrent authority over some limited aspects of the commerce of liquor." *324 Liquor Corp.*, 479 U.S. at 354 (O'Connor, J., dissenting). As Justice Black (who was a member of the Senate during the debates on the Amendment, *see id.* at 353) wrote:

[W]hen the Senators agreed to Section 2 they thought they were returning 'absolute control' of liquor traffic to the States, free of all restrictions which the Commerce Clause might before that time have imposed. Moreover, by rejecting Section 3, they thought they were seeing to it that the Federal Government could not interfere

following questions: (1) Is it constitutional? (2) If so, why is the prohibition against numerical statements of alcohol content any less constitutional?

with or restrict the State's exercise of the power conferred by the Amendment.

Hostetter, 377 U.S. at 338 (Black, J., dissenting); *see also 324 Liquor Corp.*, 479 U.S. at 354 (O'Connor, J., dissenting) (noting that the "Senate discussions clearly demonstrate an intent to confer on States complete and exclusive control over the commerce of liquor").

Amici recognize, however, that this case does not present an appropriate occasion to revisit the holdings in these and other cases. Accordingly, because section 205(e)(2) merely serves to assist the States in the enforcement of their respective malt beverage labeling laws, it is a permissible exercise of Congress' commerce clause powers as construed by the Court's prior decisions. *See, e.g., Hostetter*, 377 U.S. at 332. As such, section 205(e)(2) should receive the presumption of validity afforded state regulation under the Amendment. *See LaRue*, 409 U.S. at 118-19. Because, as explained above, state labeling prohibitions clearly satisfy rational basis review, section 205(e)(2) is likewise constitutional.*

* *Amici* respectfully submit that even if the Court concludes that § 205(e)(2) is unconstitutional, it should recognize the broad regulatory powers conferred on the States by the Twenty-first Amendment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

RICHARD RUDA *

Chief Counsel

JAMES I. CROWLEY

STATE AND LOCAL LEGAL CENTER

444 North Capitol Street, N.W.

Suite 345

Washington, D.C. 20001

(202) 434-4850

* Counsel of Record for the

Amici Curiae

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

LLOYD BENTSEN, SECRETARY OF THE TREASURY,
ET AL.,

Petitioners,

v.

THE COORS BREWING COMPANY,

Respondent.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

**BRIEF OF *AMICUS CURIAE* SUBMITTED BY THE
CENTER FOR SCIENCE IN THE PUBLIC INTEREST
IN SUPPORT OF PETITIONERS**

Of Counsel:
George A. Hacker
CENTER FOR SCIENCE
IN THE PUBLIC INTEREST
(202) 332-9110

Bruce A. Silverglade
Counsel of Record
CENTER FOR SCIENCE
IN THE PUBLIC INTEREST
1875 Connecticut Ave. N.W.
Suite 300
Washington, D.C. 20009-5728
Attorney for Amicus Curiae

QUESTION PRESENTED

I. Does the government's regulation of alcohol content figures on beer and other malt beverage labels comport with the free speech provision of the First Amendment of the Constitution?

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

LLOYD BENTSEN, SECRETARY OF THE TREASURY,
ET AL,
Petitioners,

v.

THE COORS BREWING COMPANY,
Respondent.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

**BRIEF OF AMICUS CURIAE SUBMITTED BY THE
CENTER FOR SCIENCE IN THE PUBLIC INTEREST
IN SUPPORT OF PETITIONERS¹**

STATEMENT OF INTEREST

The Center for Science in the Public Interest (CSPI) is a non-profit consumer health organization founded in 1971. CSPI is located in Washington, DC, and is supported by 750,000 members, foundation grants, and the sale of educational publications. The goals of CSPI are to educate the public on health issues, to improve federal and state health policies, and to monitor trade practices that adversely affect the public health and welfare.

¹ CSPI has gained the consent of all parties to file as *Amicus Curiae*. The letters of consent are being submitted to this Court with the original copy of this brief.

CSPI's interest in alcohol labeling dates back to 1972 when we first requested the Bureau of Alcohol, Tobacco and Firearms (BATF) to include ingredient information on alcoholic beverage labels. In 1981, CSPI commenced litigation under Section 5(e) of the Federal Alcohol Administration Act, 27 U.S.C. § 205(e) to achieve this goal. CSPI's efforts have resulted in partial ingredient disclosures on alcoholic beverage labels. *See CSPI v. Treasury*, 573 F. Supp. 1168 (D. D.C. 1983); *appeal dismissed*, 727 F.2d 1161 (D.C. Cir. 1984).

Also, in 1981, CSPI formed the Alcohol Policies Project to spearhead our efforts to improve policies regarding alcoholic beverages. In 1983, the Project's report, *The Booze Merchants*, touched off a national debate on the labeling and advertising of alcoholic beverages. In 1988, the Project led a coalition that successfully campaigned for federal legislation to require health and safety warning labels on all alcoholic beverages. *See* 27 U.S.C. § 215. In recent years, CSPI has become particularly concerned about the impact of drinking on young Americans and has favored disclosure of information pertaining to alcohol consumption and health in advertising.

As is evident, CSPI favors the inclusion of increased consumer information on alcoholic beverage labels and in advertising.² However, in 1989, CSPI filed an *amicus curiae* brief with U.S. Court of Appeals for the Tenth Circuit in this case urging that the court uphold the constitutionality of Section 5(e)(2) of the Federal Alcohol Administration Act, 27 U.S.C. § 205(e)(2), which prohibits the disclosure of alcohol content on beer labels. We take this position because the disclosure of alcohol content in the manner that Coors believes is its constitutional right is inherently misleading and irresponsible.

² CSPI also led a coalition of organizations that urged Congress to enact the Nutrition Labeling and Education Act of 1990, 21 U.S.C. 403(q), which requires nutrition information on all food labels regulated by the Food and Drug Administration.

CSPI is highly interested in the issues before this Court and our members will be directly affected by the outcome of this Court's decision. We hope and believe that this Court will profit from the knowledge and expertise that we can bring to bear on the issues presented here.

STATEMENT OF FACTS

CSPI adopts the Petitioner-Government's statement of facts by reference.

SUMMARY OF THE ARGUMENT

CSPI generally favors the provision of consumer information on food and beverage labels. However, we believe that the Tenth Circuit's decision that permits Coors to tout the alcohol content of beer on labels must be overturned for at least four reasons:

1) Simply placing the percentage of alcohol by *volume* on beer labels would be an inherently misleading half-truth and hence not constitutionally protected, because beer would appear deceptively low in alcohol compared to wine and liquor.

2) Under the Constitution, the government has a substantial interest in prohibiting alcohol content labeling. One of Coors' admitted reasons in originally bringing this case is to use alcohol content labeling to dispel Coors' image of being a "weak" beer. Disclosure of alcohol content in the manner that Coors seeks will lead to an irresponsible "horsepower race" among Coors and other brewers based on alcohol content and will exacerbate societal problems relating to alcohol abuse, particularly among young people.

3) The Tenth Circuit held incorrectly that the government did not adequately support its finding that the prohibition of alcohol content labeling directly advanced the government's interest in preventing a "horsepower race" among brewers. Since the Tenth Circuit's decision (and the issuance of an

interim government regulation permitting alcohol content labeling that was made necessary by that decision) *an actual "horse-power race" has started among brewers, just as the government predicted*. The Tenth Circuit's decision thus ignores well-accepted observations about the alcoholic beverage marketplace and poses a serious threat to the entire body of administrative law which allows regulatory agencies to act on the basis of agency expertise.

4) The position urged by Coors threatens other essential consumer protection laws and regulations that prohibit the disclosure of a variety of information in order to achieve important governmental interests.

ARGUMENT

The issue in this case is whether the limitation of commercial speech in section 5(e)(2) of the Federal Alcohol Administration Act (FAAA), 27 U.S.C. §205(e)(2), is constitutionally valid. The Supreme Court has articulated a four-part test to determine the validity of commercial speech limitations. See *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980); *Posadas de Puerto Rico Assoc. v. Tourism Company of Puerto Rico*, 478 U.S. 328 (1986); *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469 (1989).

I. THE ALCOHOL CONTENT FIGURES THAT COORS SEEKS TO INCLUDE ON BEER LABELS ARE INHERENTLY MISLEADING AND THUS NOT ENTITLED TO ANY FIRST AMENDMENT PROTECTION.

First, it must be determined whether the speech in question qualifies for First Amendment protection. *Central Hudson*, at 566. Commercial speech is protected only if it concerns a lawful activity and is not false or misleading. *Id.* The alcohol content figures that Coors wants to tout on beer labels are not protected

by the First Amendment because such figures are inherently misleading half-truths. While technically true, such labeling would deceptively make beer appear to be less intoxicating than wine and liquor when in fact beer is not.³ Beers, which range from approximately 3.2% to 5% alcohol by volume, would appear lower in alcohol when compared to wines or liquor (which range from approximately 11% to 75% alcohol by volume). Yet, an average serving of beer is not lower in alcohol than an average serving of wine or liquor.

According to the *Dietary Guidelines For Americans*, published jointly by the U.S. Department of Health and Human Services and the U.S. Department of Agriculture, one can of beer (12 oz.) is equal in total alcohol content to a glass of wine (5 oz.) and to a mixed drink (1.5 oz. of 80 proof distilled spirits).⁴ As the provision of this information in the *Dietary Guidelines* indicates, many consumers do not realize that one serving of each of these beverages contains the same amount of alcohol. Thus, there is a great potential for consumer deception and manipulation, the very problem the FAAA seeks to prevent. Such speech does not deserve constitutional protection.

In its original decision, the Colorado District Court found it difficult to see how a truthful statement regarding alcohol content can be misleading. Reporter's Transcript of Hearing for Summary Judgement, *Coors v. Baker*, No. 87-Z-977 (D. Colo. 1989) at 50. In fact, courts have repeatedly found that literally truthful statements can have misleading and deceptive implications. See *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985) (Attorney adver-

³ The Speaker and Bipartisan Leadership Group of the U.S. House of Representatives originally argued in the Colorado District Court that alcohol content labeling is inherently misleading, see *Coors v. Brady*, 944 F.2d 1543, 1547 (10th Cir. 1991). It is unclear why the House did not pursue this position.

⁴ United States Departments of Agriculture and Health and Human Services, *Dietary Guidelines for Americans* 23 (1990) (see Appendix A-3).

tising on a contingency-fee basis, which waives legal fees but not court costs, was misleading since consumers would perceive no bill would accrue unless they win); *Kraft v. FTC*, 970 F.2d 311 (7th Cir. 1992) (Kraft's claim that each slice of cheese has 5 ounces of milk, while true, was misleading since much of the calcium found in milk is lost during processing); *Ibanez v. Florida Department of Business and Professional Regulations*, 114 S. Ct. 2084, 2091 (1994); *Thompson Medical v. FTC*, 791 F.2d 189, 197 (D.C. Cir. 1986); *Renovation Int'l Corporation v. FTC*, 111 FTC 206, 292-295, *aff'd* 884 F.2d 1489 (1st Cir. 1989).

The District Court's uninformed pronouncement also flies in the face of traditional consumer protection statutes enacted by Congress. For example, under the Federal Food, Drug and Cosmetic Act, the Food and Drug Administration has prohibited food labels from listing fat content as a percentage of weight. Thus, the statement "contains five percent fat" on a processed food label is prohibited if the statement implies that the food is low in fat when in fact it is not.⁵ Similarly, in this case, a beer label that states "contains 4.5% alcohol by volume" implies that the beer is low in alcohol when in fact a serving of beer contains as much alcohol as a shot of whiskey.

The statements that Coors wishes to include on beer labels are thus inherently misleading half-truths and not deserving of any constitutional protection.

⁵ 21 CFR § 101.62(b)(3)(i). The claim is prohibited unless the food meets the FDA's definition of "low fat." *Id.*

II. REGULATION OF ALCOHOL CONTENT LABELING IS CONSTITUTIONALLY VALID BECAUSE THE INCLUSION OF SUCH FIGURES ON BEER LABELS WOULD LEAD TO UNFAIR AND IRRESPONSIBLE COMPETITION BASED ON ALCOHOL STRENGTH.

Assuming that the disclosure of alcohol content by volume is not misleading, BATF's regulation of alcohol content labeling is still constitutional. This Court has consistently held that even truthful, non-misleading commercial speech may be prohibited whenever the prohibition serves a substantial governmental interest, directly advances that interest, and constitutes a reasonable fit between the prohibition and the interest served. *Fox*, 492 U.S. at 480. In this case, the original interest advanced by the statute — to prevent reckless, unfair competition based on alcohol strength — remains important today and is directly advanced by the sections of the law under attack by Coors. Furthermore, there is a reasonable fit between the restraints on speech and the government's interest that is being served. Congress can thus legitimately prohibit alcohol content labeling even if it is truthful and non-misleading.

A. The Governmental Interest in Regulating Alcohol Content Labeling is Substantial.

The Tenth Circuit held correctly that the government's interest in preventing "horsepower races" among brewers was substantial. *Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1547-49 (10th Cir. 1991) (hereinafter *Coors I*).

Congress was profoundly concerned with the alcoholic beverage industry's propensity to use alcohol content to compete unfairly. Federal Alcohol Control Act, S. Rep. No. 1215, 74th Cong., 1st Sess. § 2 (1935).⁶ Furthermore, Congress found

⁶ Liquor control legislation has as its primary aim the protection of public welfare by preserving health. *Singer*, 3A *Sutherland Stat. Const.* § 71.03, at 244 (5th ed. 1992). The goal of the FAAA was to protect public

that the previous uses of alcohol content on labeling were nothing more than “*attempts to take advantage of consumer ignorance.*” *Id.* (emphasis added). Accordingly, Congress concluded that “[m]alt beverages should not be sold on the basis of alcoholic content.” H.R. Rep. No. 1542, 74th Cong., 1st Sess. 12-13 (1935), *reprinted in Legislative History* at 68.

The practices that sparked this congressional action sixty years ago are still a serious concern today. As discussed openly in trade press reports, consumers think Coors beer tastes more watery than other beers. This has led to Coors beer being nicknamed “Colorado Kool-Aid”.⁷ Coors admitted at oral argument that it desires to state the alcohol content of its products to dispel Coors’ image of being a “weak” beer. *Coors I*, 944 F.2d at 1549.⁸ The Tenth Circuit erred in its reasoning when it stated that Coors’ admission does not show that the company is likely to engage in a strength war because Coors could “overcome this mis-perception by simply publishing the percentage of alcohol content on the label.” *Adolph Coors Co. v. Lloyd Bentsen*, 2 F.3d 355, 359 (10th Cir. 1993) (hereinafter *Coors II*). Even if Coors could achieve its marketing objectives by simply listing

health and to prevent unfair competition in the alcoholic beverage industry. Office of the General Counsel, Federal Alcohol Control Administration, *Legislative History of the Federal Alcohol Administration Act: Public Law No. 401, Seventy Fourth Congress, H.R. 8870* (1935) (*Legislative History*).

⁷ *Brewing Up Trouble*, Advertising Age, July 27, 1987, at 16 (see Appendix B; Hume, *Coors Fights Label Restriction*, Advertising Age, July 13, 1987, at 27 (see Appendix C).

⁸ In an article published six months after Coors filed its original complaint, Robert Rechholtz, Coors Executive Vice President of Sales and Marketing, specifically announced that Coors wanted to use alcohol content information to advise consumers that Coors beer contains just as much alcohol as beers produced by Anheuser Busch, a competitor of Coors. Goeken, *Listing Alcohol in Beer Near*, Rocky Mountain News, Dec. 27, 1987, at 73 (see Appendix D).

alcohol content without increasing the strength of its beer, other brewers might respond to Coors’ rehabilitation of its image by increasing the alcohol content of their beers and listing such information on labels.⁹

Moreover, a Coors advertisement indicates that the Tenth Circuit deemed Coors’ stated reasons to be too virtuous. A Coors advertisement indicates that the company is indeed inclined towards marketing beer as an intoxicant. A “jingle” for “Coors Extra Gold” states:

You know I like my beer, I like it a lot.
Drink it down to the bottom.
Start again at the top...
 Pour that gold and give me some space,
 ‘cause when I’m drinking my brew I got no time to waste.
 Gonna taste that Extra Gold taste and
Pour it into my face.

(see Appendix E, emphasis added). These statements are accompanied by fast-paced rock music. Encouraging people to “drink it down to the bottom, start again at the top” and to pour beers into their faces is not a responsible way to market beer, particularly when such a message is set to rock music — the genre of choice among young people.

Beer is the alcoholic drink of choice of under-age drinkers.¹⁰ Disturbing proportions of young people engage in heavy drinking practices that may become more dangerous if their preference for higher-alcohol beer is facilitated by alcohol content labeling. Over 40% of all college students¹¹ and 28% of

⁹ Coors has admitted the possibility that strength wars could arise as a result of alcohol content labeling. Brief for Plaintiff/Appellee at 31-32, *Coors I*, 944 F.2d 1543.

¹⁰ Office of Inspector General, Department of Health and Human Services, *Youth and Alcohol: A National Survey* 7 (1991).

¹¹ Center on Addiction and Substance Abuse at Columbia University, *Rethinking Rites of Passage: Substance Abuse on America’s Campuses* 14 (June 1994)(hereinafter CASA).

high school seniors report binge-drinking (five or more drinks at a time) in the last two weeks.¹² One in three college students now drinks primarily to get drunk.¹³ Alcohol-related traffic crashes are a leading cause of death among persons aged 15-24 years.¹⁴ Alcohol has also been identified as a major factor in campus rapes, transmission of sexually transmitted diseases, including AIDS, school failures, and campus vandalism.¹⁵ The government's fear of "strength wars" takes on flesh and blood, and often life and death importance for this population of heavy beer-drinking young people.

Responsible members of the advertising industry are hostile to Coors' effort to use alcohol content disclosures to tout the strength of its products. In an *Advertising Age* editorial concerning this case, one industry observer commented:

We find it a little hard to believe that the reason Adolph Coors Co. wants to change a law that bars brewers from listing alcohol content is so it can advertise its beer as "a beverage of moderation." . . . Other brewers have opposed listing of alcohol content on the basis that it might result in a race to see who can brag about more alcohol than the other guy . . . One competitor suggests that Coors' real purpose in its court challenge of the law is to be able to show that its alcohol content is on par with or ahead of other leading beers, to dispel Coors' image as "Colorado Kool-Aid."¹⁶

¹² L. Johnson, *Monitoring the Future Survey*, (NIDA) U. of Mich. Inst. Soc. Res., Table 1 (January 1994).

¹³ CASA, *supra*, at note 11.

¹⁴ Luis G. Escobedo, *Drinking and Driving Among US High-School Students*, *The Lancet*, Feb. 12, 1994, at 421.

¹⁵ CASA, *supra* at note 11.

¹⁶ *Brewing Up Trouble*, *Advertising Age*, July 13, 1987, at 16 (Appendix B).

The Tenth Circuit found correctly that the government's authority to prohibit alcohol content information in *advertising* was constitutional, *see* Section 205(f)(2) of the FAAA. However it overlooked the District Court's decision to ignore the fact that pictures of beer *labels* routinely appear in beer advertising. Reporter's Transcript of Bench Ruling, *Coors v. Brady*, No. 87-Z-977 (D. Colo. 1992) at 5. Thus, under the Tenth Circuit's decision, Coors would be free to promote the strength of its beer in advertising by simply depicting a picture of its beer label in advertisements.

It is sadly ironic that at a time when problems relating to alcohol are so severe, Coors wishes to market beer on the basis of alcoholic strength. Beer is the predominant source of alcohol consumed in America, accounting for 54% of all alcohol consumed in 1990.¹⁷ Alcohol is a factor in approximately 105,000 deaths each year.¹⁸ The alcohol-related death toll on our highways is well known. Alcohol is estimated to cause between 3% and 10% of all deaths, including 60% to 90% of cirrhosis deaths, 16% to 67% of home injuries, drownings, fire fatalities, and job injuries, and 3% to 5% of cancer deaths.¹⁹

Alcohol affects practically every organ in the body and causes brain damage, liver cirrhosis, birth defects, heart disease, and cancers of the liver, mouth, throat, esophagus, and larynx when consumed in sufficient quantity.²⁰ In 1990 alcohol problems cost society \$100 billion.²¹ Some 76 million Americans

¹⁷ National Institute on Alcohol Abuse and Alcoholism, *Surveillance Report #23 - Apparent Per Capita Alcohol Consumption: National, State, and Regional Trends, 1977-1990*, 16 (1992).

¹⁸ Michael J. McGinnis, *Actual Causes of Death in the United States*, 270 *J. Am. Med. Ass'n* 18 (November 10, 1993).

¹⁹ *Id.*

²⁰ *Id.*

²¹ D.P. Rice, et al., *The Economic Costs of Alcohol and Drug Abuse and Mental Illness: 1985*, Institute on Alcoholism and Aging (revised December 1992).

are affected by alcohol abuse at some time.²² Accordingly, this is no time for Coors or any other brewer to encourage consumption of products based upon their alcohol content.

Congress retains a substantial interest in maintaining Section 5(e)(2) of the FAAA, especially considering that Coors is on record as wanting to engage in marketing practices that would lead other brewers into an alcohol content "horsepower race" despite the growing public concern over alcohol abuse among young people. It is clearly established that an interest in the health, safety, and welfare of the citizenry constitutes a substantial government interest. *Posadas*, 478 U.S. at 341. Also well established is the government interest in prohibiting commercial speech related to alcohol in order to reduce the harm alcohol causes. *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490, 500 (10th Cir. 1983), *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738 (5th Cir. 1983).

**B. The Regulation of Alcohol Content Labeling
Directly Advances the Government's Interest.**

1. *The Tenth Circuit erred by holding that the government must make an empirically precise showing under Edenfield v. Fane.*

This is a case where Congress has sought to alleviate a serious public health problem through a restriction of commercial speech. The Supreme Court has concluded that a legislature may reasonably presume that prohibitions of commercial speech are effective in reducing the incidence of an activity that is injurious to the public welfare. *Posadas*, 478 U.S. at 343-45. Furthermore, in *Metromedia Inc. v. City of San Diego*, 453 U.S. 490 (1981), this Court ruled that the "accumulated common sense judgments" of the legislature should not be overturned

²² McGinnis, *supra* note 18.

unless they are "manifestly unreasonable." *Id.* at 509 (plurality opinion).²³

The third prong of the *Central Hudson* test does not require an empirically exact government showing if the prohibited speech concerns the sale of products associated with substantial societal harms. Rather, it provides that the regulation of commercial speech may not be sustained if it provides only "ineffective or remote support for the government's purpose" 447 U.S. at 564. As interpreted in *Posadas*, the majority found a duly sufficient constitutional "link" based on what the legislature of Puerto Rico "obviously believed," a finding the Court characterized as a constitutionally "reasonable one" in these kinds of cases. 478 U.S. at 341-342. Implicit in this Court's statements and its holding is the basic notion that where certain socially harmful products are marketed or advertised, no exacting empirical proof is required. Where, for example, alcohol marketing is involved, the government need not remain hopelessly idle in combatting the social ills associated with this product until proof of certainty is tendered. Clearly, when it comes to products such as alcohol, *Central Hudson* and its progeny do not require an empirically strict showing. A constitutionally reasonable or sound link will suffice. *Metromedia*, 435 U.S. at 509 (plurality opinion).

The Tenth Circuit erred in holding that the government's primary reliance on anecdotal evidence was insufficient under this Court's holding in *Edenfield v. Fane*, 113 S. Ct. 1792 (1993). In *Edenfield*, this Court struck down a Florida ban on CPA solicitation where the government presented "no studies that suggest personal solicitation . . . creates the dangers . . . the

²³ The Tenth Circuit itself held in a related case that "prohibitions against the advertising of alcoholic beverages are reasonably related to reducing the sale and consumption of those beverages and their attendant problems. The entire economy of the [alcoholic beverage industry] is based on the belief that advertising increases sales." *Telecasters*, 699 F.2d at 501.

Board claims to fear, *nor even anecdotal evidence that validates the Board's supposition.*" *Id.* at 1800 (emphasis added). Thus, under *Edenfield*, this Court suggested that anecdotal evidence alone may be sufficient to validate certain prohibitions of commercial speech.²⁴

The Tenth Circuit also mischaracterized the nature of the evidence the government relied on to find that the prohibition on alcohol content disclosure directly advances the government's interest in discouraging strength wars among beer producers. BATF did not offer only "inferential arguments based on mere speculation and conjecture," as the Tenth Circuit alleged. *Coors II*, 2 F.3d at 359. Rather, the government presented testimony and documentary information justifying its position. Relying on its institutional expertise and experience in this area of regulation, BATF concluded that a ban on alcohol content disclosure would directly advance the government's interest in discouraging strength wars.

Where an agency has found "implied claims based solely on its own intuitive reading of the advertisements, it is unnecessary to resort to extrinsic evidence." *Kraft v. FTC*, 970 F.2d 311, 315 (7th Cir. 1992). In *Kraft*, the Seventh Circuit found that the government could order the cessation of commercial speech that a government agency, based on its own expertise, found to be unfair and deceptive. The Seventh Circuit stated: "extrinsic evidence is unnecessary because common sense and administrative experience provide the Commission with adequate tools to make its finding." *Id.* at 320 (quoting *Colgate-Palmolive v. FTC*, 380 U.S. 374, at 391-2 (1965) (The FTC need not conduct a consumer survey in finding a commercial misleading); *Zauderer*, 471 U.S. at 652-53 (Implied claims that are self-evi-

²⁴ The lower courts have correctly interpreted *Edenfield* in this manner. See, e.g. *New York State Association of Realtors, Inc. v. Shaffer*, 833 F. Supp. 165, 179 (E.D. N.Y. 1993) (quoting *Edenfield*, 113 S. Ct at 1800).

dent do not require the State to conduct a public survey before finding an advertisement misleading).²⁵

2. *A new "horsepower race" has started since the Tenth Circuit's decision.*

The government's interest in this case is to prevent "horsepower races" among brewers that would contribute to alcohol abuse. Section 5(e)(2) of the FAAA has helped discourage this kind of competition for over fifty years. This, by itself, is a strong indication that the law has directly advanced the intended governmental purpose.

Not surprisingly, since the Tenth Circuit's decision in this case (and the issuance of the Bureau of Alcohol, Tobacco and Firearms' April 1993 Interim Rule responding to the Tenth Circuit's order to permit alcohol content labeling)²⁶ a new strength war has started. In late 1993, several major brewers began marketing a new product, "ice beer." Because the recipe for making these beers involves removing ice crystals at the end of production, most of these beers end up containing approximately 15% more alcohol than ordinary beers.

²⁵ See also *Thompson Medical Co. v. FTC*, 791 F.2d 189, 197 (D.C. Cir. 1986); ("In determining the meaning likely to be conveyed by advertisements ... the [agency] may rely on its own reasoned analysis of the advertisements themselves, without resorting to surveys or consumer testimony." *Id.* at 197); *National Bankers Services, Inc. v. FTC*, 329 F.2d 365, 367 (7th Cir. 1964); *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 40-41 (D.C. Cir. 1985) (Court rejects Appellant's contention that a consumer survey must be provided as evidence of consumer perception); *Bristol-Myers, Co. v. FTC*, 738 F.2d 554 (2nd Cir. 1984) (In interpreting [aspirin] advertisements the FTC may rely on its own expertise in this area and need not resort to surveys and consumer testimony"); *J.B. Williams Co. v. FTC*, 381 F.2d 884, 890 (6th Cir. 1967); *Zenith Radio Corp. v. FTC*, 143 F.2d 29, 31 (1944) (Commission could decide for itself whether the advertisement was deceptive without requiring a public opinion poll regarding an ad).

²⁶ See *Alcoholic Content Labeling for Malt Beverages*, 58 Fed. Reg. 21,228 (1993) (to be codified at 27 C.F.R. Part 7).

Brewers have been quick to tout the enhanced alcohol content of ice beers. One industry analyst noted that "[t]he brewers are counting on that extra kick to bring some excitement to a stagnant market."²⁷ In a trade magazine interview, Pabst Brewing Company Chairman Lutz Issleib characterized the marketing plan for his company's ice beer product as he recounted a visit to a retail store:

I saw this big stack of Bud Ice, and I said, "Boy, this is beautiful stacking." He [the store manager] said, "Yeah, but it ain't moving." And I asked, "Well, what's moving?" And he said, "The Molson Ice that's over here." I asked "Why?" He pulled out a can and said, "Because it's got that there." The alcohol content. So I immediately called Milwaukee and said, Add the alcohol! Let's beef it up. They got 5.65 [% alcohol by volume], so mine is 5.7. . . .²⁸

This sudden outbreak of beer "strength wars" as soon as alcohol content labeling became permissible is a strong indication that the law, as it previously stood, has directly advanced the intended governmental purpose. The Tenth Circuit was thus incorrect when it stated that "...brewers in the United States have no intention of increasing alcohol strength, regardless of labeling regulations . . ." *Coors II*, 2 F.3d at 359. To let this prohibition permanently fall would simply open the door wider to the irresponsible marketing of beer on the basis of alcohol content. In both *Telecasters* and in this case, a legislative body sought to reduce alcohol abuse by limiting commercial statements relating to alcoholic beverages. This approach was up-

²⁷ Hannon, *On Tap Soon 'Ice Beers'*, U.S. News & World Rep't, Nov. 15, 1993 (quoting Michael Bellas, president of Beverage Marketing).

²⁸ Allan, *Beer Maverick Lutz Issleib Takes On Conventional Sales Tactics*, *Impact*, Dec. 1, 1993, at 5 (quoting Lutz Issleib, Chairman, Pabst Brewing Company).

held by the Tenth Circuit in *Telecasters* and it should be upheld here.

C. There is a Reasonable Fit Between the Regulation of Alcohol Content Labeling and the Governmental Interest Served.

The Tenth Circuit stated that it needn't discuss the fourth prong of the *Central Hudson* test because it found that the prohibition on alcohol content labeling was impermissible under the third prong of *Central Hudson*. The Tenth Circuit should have found, however, that Section 205(e)(2) of the FAAA meets the requirements of both the third and fourth prongs of the *Central Hudson* test.

This Court has ruled that a prohibition of commercial speech requires a "'fit' between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition, but one whose scope is 'in proportion' to the interest served." *Fox*, 492 U.S. at 480. The interest to be served by the FAAA is the protection of the public's health and the prevention of unfair competition. Prohibiting disclosure of alcohol content is certainly a reasonable and effective way of preventing such irresponsible, unfair trade practices.

We recognize that the current regulatory scheme as embodied in the FAAA is not without flaws. Ideally, we would hope that Congress would enact legislation requiring that labels fully and completely inform consumers about the alcohol content of all alcoholic beverages including wine and distilled spirits. Such information would consist not of the half-truths that Coors claims is its constitutional right to list on labeling, but rather of full and complete information that accurately informs consumers as to the actual alcohol content of typical *servings* of beer, wine and liquor.

The judicial forum, though, is not the proper venue for Coors to attempt to change the regulation of alcohol content labeling.²⁹ Rather, this step will require Congress to enact legislation that standardizes alcohol content measurement for all forms of alcoholic beverages and requires disclosure of such information to be made in conjunction with warning statements on labels that convey the dangers of excessive alcohol consumption.³⁰ However, the fact that Congress has not yet enacted this precise type of legislation does not mean that the current prohibition on alcohol content labeling is constitutionally invalid. On the contrary, the prohibition directly advances the government's objective to prevent irresponsible, unfair competition based on alcohol content, problems that have already been exacerbated by the Tenth Circuit's decision.

²⁹ The issue before this Court is whether the prohibition of alcohol content labeling directly advances the government's objective of discouraging strength wars. The Fifth Circuit held that "the relationship between advertising and consumption is a legislative and not an adjudicative fact." *Dunagin*, 718 F.2d at 748. The determination of such a relationship involves societal factors and events which may have some empirical statistics, but it is ultimately a question of reasoning and opinion. That reasoning is the responsibility of legislators, subject to information and suggestions from experts and social scientists. See *Metromedia*, 453 U.S. 490 (1981) (The decision of whether billboards divert drivers' attention and whether this causes highway accidents is a legislative decision, not judicial); *Telecasters*, 699 F.2d at 500.

³⁰ Since November 18, 1989, the labels of all alcohol products must bear the following warning:

GOVERNMENT WARNING: (1) According to the Surgeon General, women should not drink alcoholic beverages during pregnancy because of the risk of birth defects. (2) Consumption of alcoholic beverages impairs your ability to drive a car or operate machinery, and may cause health problems.

27 U.S.C. § 215.

III. THE TENTH CIRCUIT'S ERRONEOUS DECISION THREATENS OTHER ESSENTIAL FEDERAL AND STATE CONSUMER PROTECTION LAWS.

A number of consumer protection laws and regulations at the federal and state levels prohibit words or phrases used in marketing. Regulated industries may challenge all of these laws and regulations if this Court fails to overturn the Tenth Circuit's decision.

For example, the Nutrition Labeling and Education Act of 1990 (NLEA), Pub. L. No. 101-535, 104 Stat. 2353 (1990), 21 U.S.C. § 403(r) requires the Food and Drug Administration (FDA) to prohibit numerous health and nutrition claims on food labeling. Thus, under the NLEA, a food company cannot state on the front of a food label that the product has "90 calories per serving" even though the statement is true. 21 CFR § 101.13(i)(2). Such regulations further the FDA's goal of creating a limited lexicon of nutrition terminology that consumers can learn to rely on for standardized information about the nutritional value of various foods. The FDA's regulations under the NLEA constitute an important public health measure because they assist consumers in making more healthful dietary choices.³¹

An example of the type of state consumer protection laws threatened by the position advocated by Coors is the Texas legislature's prohibition of any use of the word "notario publico" in advertising by a notary public. Tex. Gov't Code Ann. § 406.017(c). Although "notario publico" is a literal and truthful translation into Spanish of "notary public," the term is inherently

³¹ FDA estimates that these food labeling reforms will reduce the risk of heart disease and cancer by 39,000 cases and save billions of dollars in health-care costs over a 20-year period. 56 Fed. Reg. 60,856, 60,857 (November 27, 1991) (proposed rule). The United States Department of Agriculture has promulgated similar regulations for the labeling of meat and poultry products. See 9 CFR Parts 317 and 381.

deceptive because in Mexico a "notario publico" is a licensed attorney. Thus, the Texas legislature determined that the term "notario publico" is so intrinsically deceptive that its use by a notary public who chooses to advertise in Spanish must be prohibited absolutely.

If this Court adopts the Tenth Circuit's interpretation of the First Amendment, then regulated industries may argue that these laws, and others like them, are unconstitutional. As can be seen, however, such laws serve essential purposes by prohibiting the use of terms that interfere with the advancement of important governmental interests.

CONCLUSION

For the foregoing reasons, the decision of the Tenth Circuit should be overturned and section 205(e)(2) of the FAAA should be declared constitutional.

Respectfully submitted,

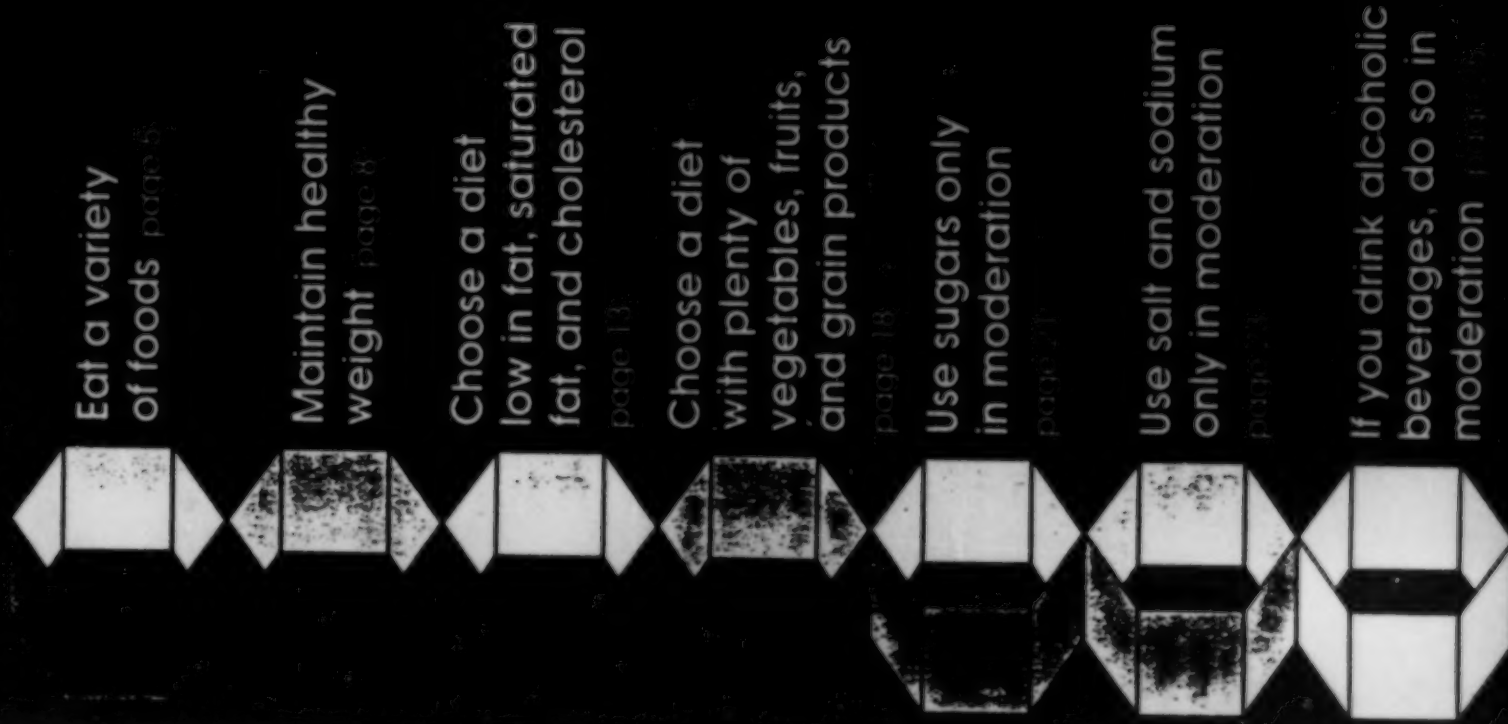
Bruce A. Silverglade
Counsel of Record
CENTER FOR SCIENCE
IN THE PUBLIC INTEREST
1875 Connecticut Ave., N.W.
Suite 300
Washington, D.C. 20009
(202) 332-9110, Ext. 362

Attorney for *Amicus Curiae*

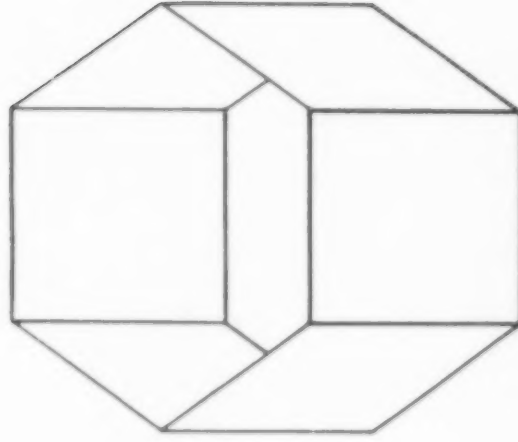
Of Counsel:

George A. Hacker
CENTER FOR SCIENCE
IN THE PUBLIC INTEREST
August 5, 1994

Nutrition and Your Health:
**Dietary Guidelines
for Americans**



Third Edition (1990)
U.S. Department of Agriculture
U.S. Department of Health and Human Services



If You Drink Alcoholic Beverages, Do So in Moderation

Alcoholic beverages supply calories but little or no nutrients. Drinking them has no net health benefit, is linked with many health problems, is the cause of many accidents, and can lead to addiction. Their consumption is not recommended. If adults elect to drink alcoholic beverages, they should consume them in moderate amounts (see box on page 26).

Some people should **not** drink alcoholic beverages:

- **Women who are pregnant or trying to conceive.** Major birth defects have been attributed to heavy drinking by the mother while pregnant. Women who are pregnant or trying to conceive should not drink alcoholic beverages. However, there is no conclusive evidence that an occasional drink is harmful.
- **Individuals who plan to drive or engage in other activities that require attention or skill.** Most people retain some alcohol in the blood 3 to 5 hours after even moderate drinking.

- **Individuals using medicines, even over-the-counter kinds.** Alcohol may affect the benefits or toxicity of medicines. Also, some medicines may increase blood alcohol levels or increase alcohol's adverse effect on the brain.
- **Individuals who cannot keep their drinking moderate.** This is a special concern for recovering alcoholics and people whose family members have alcohol problems.
- **Children and adolescents.** Use of alcoholic beverages by children and adolescents involves risks to health and other serious problems.
Heavy drinkers are often malnourished because of low food intake and poor absorption of nutrients by the body. Too much alcohol may cause cirrhosis of the liver, inflammation of the pancreas, damage to the brain and heart, and increased risk for many cancers.
Some studies have suggested that moderate drinking is linked to lower risk for heart attacks. However, drinking is also linked to higher risk for high blood pressure and hemorrhagic stroke.
Advice for today: If you drink alcoholic beverages, do so in moderation; and don't drive.

WHAT'S MODERATE DRINKING?

Women: No more than 1 drink a day

Men: No more than 2 drinks a day

Count as a drink:

- 12 ounces of regular beer
- 5 ounces of wine
- 1 1/2 ounces of distilled spirits (80 proof)

APPENDIX B

Advertising Age, July 27, 1987

Brewing up trouble

We find it a little hard to believe that the reason Adolph Coors Co. wants to change a law that bars brewers from listing alcohol content is so it can advertise its beer as "a beverage of moderation."

Anyone who doesn't know that Coors has less alcohol per sip than Jack Daniels isn't smart enough to read the label or the advertising anyway.

Other brewers have opposed listing of alcohol content on the basis that it might result in a race to see who can brag about more alcohol than the other guy. And that would be sure to mobilize anti-alcohol forces and those who would ban alcohol advertising.

One competitor suggests that Coors' real purpose in its court challenge of the law is to be able to show that its alcohol content is on a par with or ahead of other leading beers, to dispel Coors' image as "Colorado Kool-Aid."

That may be a legitimate marketing objective—after all, people don't drink beer just because it's wet. But with so many people concerned about alcohol abuse and ready to push for drastic legislation to curb it, we hope the court shuts off Coors' plan.

Advertising Age, July 13, 1987

Coors fights label restriction

By SCOTT HUME

Adolph Coors Co. says it is challenging federal labeling restrictions in an effort to advertise beer as a "beverage of moderation."

But at least one rival suggests Coors' real motivation is to combat its nagging image as "weak" beer.

Golden, Colo.-based Coors, the nation's fifth-largest brewer, filed suit July 2 in U.S. District Court in Denver, challenging the constitu-

tionality of the Federal Alcohol Administration Act prohibition against stating alcohol content on beer labels or in advertising.

That same law requires such disclosure for distilled spirits and wines containing 14% or more alcohol by volume.

The brewer in May petitioned the Bureau of Alcohol, Tobacco & Fire-

arms for approval to list alcohol content on packaging and in advertising. BATF turned down the request, citing the FAAA's strictures.

"If consumers are to make informed choices and act responsibly in the use of these beverages, they need the facts," said Robert Recholtz, Coors exec VP-sales and marketing. "They need to know the ac-

tual alcohol content of malt beverages as well as wine and spirits." Noting that changing preferences have brought a decline in distilled-spirit consumption, a Coors spokeswoman added that removing restrictions on brewers' labeling "would allow us to better communicate that beer is a beverage of moderation."

Coors has offered examples of labeling and advertising that include alcohol content discussion. The proposed print ad pictures various national brands and their alcohol content under the headline "Count on Coors for the facts." Froste, Coors & Belding, Chicago, handles Coors.

The spokeswoman said alcohol contents by volume for several major brands include: Coors, 1.73%; Budweiser, 4.67%; Miller High Life, 4.53%; Miller Genuine Draft, 4.61%. For light beers: Coors Light, 4.12%; Bud Light, 3.56%; Miller Lite, 4.12%.

"The real point Coors wants to make is not that its beer is lower in alcohol than distilled spirits but that it's equal in alcohol to other beers," charged an executive with another major brewery who asked for anonymity.

"A problem that has stayed with Coors as long as any other is the perception that its beer is weak. The 'Colorado Kool-Aid' image," the executive said. "Of course, their beer isn't any weaker than any others, and they may in fact be stronger. This would be the best way to show it."

Other brewers have in the past opposed alcohol-content listing and advertising out of fear that smaller brewers would promote the strength of their brands, drawing the wrath of anti-alcohol pressure groups.

As a result, competitors are not expected to join in Coors' suit.

BEST AVAILABLE COPY

Listing alcohol in beer near

U.S. backs Coors on ad campaign

By DEBORAH GOEKEM
Rocky Mountain News Staff Writer

The Adolph Coors Co. of Golden has won what it considers an important, though initial, victory with a federal ruling that brewers be allowed to tell consumers how much alcohol is in their beer.

The U.S. Department of Justice ruled that a 52-year-old federal law prohibiting brewers from listing alcohol content information on labels and advertisements is unconstitutional.

Coors sought the ruling because it believes not listing alcoholic content puts it at a competitive disadvantage. Other alcoholic beverages list such content.

Coors sued the Treasury Department and the Bureau of Alcohol, Tobacco and Firearms three months ago in U.S. District Court in Denver. The brewer complained that the federal law violates freedom of speech guarantees contained in the First Amendment to the Constitution.

While the Justice Department said last Thursday that it will no longer enforce the statute, department lawyers asked for a 30-day period in which to notify Congress that it believes the law is unconstitutional.

Members of Congress have until Nov. 12 to intervene in the case if they oppose the Justice Department's legal interpretation.

The lawsuit is on hold pending action by Congress.

Coors has attacked the controversial statute for several reasons.

The company believes that beer drinkers interested in moderation need

Alcohol content of leading beers

Heineken	4.97%
Old Style	4.91%
Coors Extra Gold	4.86%
Michelob	4.78%
Herman Joseph	4.75%
Coors Banquet	4.73%
Budweiser	4.67%
Miller Genuine Draft	4.61%
Miller High Life	4.53%
Corona	4.42%
Stroh	4.31%
Coors Light	4.12%
Miller Lite	4.12%
Bud Light	3.56%

Source: Adolph Coors, filing in U.S. District Court in Denver

DAVID PERCE/Rocky Mountain News

the alcohol content information in order to make intelligent decisions, said company spokeswoman Rhona Williams.

Some uninformed people choose wine instead of beer, even though wine actually has a higher alcoholic content, the company said.

Coors also wants consumers to know that its beer contains just as much alcohol as industry-leading Anheuser-Busch's products, Robert Rechholtz, executive vice president of sales and

marketing, said in an earlier interview. The company worries that beer-drinkers think Coors is a less substantial beer than Budweiser, he said.

However, Coors contains more alcohol by volume than Budweiser, according to laboratory tests filed with the lawsuit. For example, Coors regular beer contains 4.73% alcohol while Budweiser contains 4.67%. Coors Light

APPENDIX E

Program: Howard Stern 60 Sec. Station: WXRK
Date: June 9, 1989 6:00 a.m. City: New York

COORS EXTRA GOLD BEER

(MUSIC)

MAN SINGS: You know I like my beer, I like it a lot. Drink it down to the bottom. Start again at the top. It got Coors Cold Gold and this is my place and when I go for my brew, don't make me wait. I want an Extra Gold cold. Give me that full-tilt taste.

MAN: Yeah, beer drinkers, time for a little party tip. Never party with anything less than a full-tilt taste of Extra Gold. Come on, pop open a 12-ounce party.

MAN SINGS: Pour that gold and give me some space, 'cause when I'm drinking my brew I got no time to waste. Gonna taste that Extra Gold taste and pour it into my face.

MAN: Here's another tip for you. Next time it's party time, pick up the full tilt-taste of Extra Gold Draft at a store near you, or ask for it at your favorite place.

2ND MAN: Coors Brewing Company, Golden, Colorado.

QUESTION PRESENTED

Whether § 5(e)(2) of the Federal Alcohol Administration Act, 27 U.S.C. § 205(e)(2), which prohibits statements of alcohol content on malt beverage labels, violates the First Amendment.

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No. 93-1631
IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

LLOYD BENTSEN, SECRETARY OF THE TREASURY,
ET AL.

Petitioners,

v.

COORS BREWING CO.,

Respondent.

**On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit**

**BRIEF AMICUS CURIAE OF THE WINE INSTITUTE
IN SUPPORT OF RESPONDENT**

INTEREST OF AMICUS CURIAE

The Wine Institute is an association of California vintners. Its members include 400 California wineries and affiliated businesses, representing approximately three-fourths of the total wine production in the United States.

The Wine Institute is dedicated to enhancing the environment for the responsible enjoyment of wine. In support of that mission, the Institute encourages the moderate consumption of wine as a mealtime beverage.

The parties have consented to the filing of this brief. Their letters to that effect have been filed separately in this Court.

SUMMARY OF ARGUMENT

The government has claimed an "added presumption of validity" for the suppression of commercial speech relating to alcohol. Pet. Brief at 17, 37-38. That claim contradicts the analysis prescribed by the precedents of this Court. It also threatens to prejudice an important question of constitutional law not raised on these facts -- namely, whether and to what extent the government may prohibit scientifically supported statements on the health benefits of moderate drinking.

That alcohol abuse is unhealthy has long been understood. Only recently has it become clear that moderate consumption of alcohol is actually beneficial to health. In particular, moderate alcohol intake is associated with sharply reduced risk of coronary heart disease, leading to increased life expectancy.

Most of the data linking moderate alcohol consumption to good health are generic to alcohol, whether consumed as wine, beer, or distilled spirits. Some studies, however, have found particular benefit in wine. Research shows that wine, especially red wine, contains complex chemicals, known as phenols or flavonoids, that act as antioxidants. By preventing the oxidation of low-density lipoprotein (LDL) cholesterol, antioxidants may block the formation of unhealthy plaque on artery walls, thus lowering the risk of coronary heart disease and stroke.

Federal regulations do not allow such benefits to be mentioned in alcohol beverage labeling and advertising. Health claims are barred regardless of their accuracy, and the Bureau of Alcohol, Tobacco and Firearms (ATF) has taken, in its own words, "a very strict view" of the prohibition. ATF, Industry Circular 93-8 (Aug. 2, 1993). Indeed, until recently, the ATF even barred the wine industry from reprinting and distributing medical journal articles discussing the health benefits of its product. Letter of William T. Drake, Associate Director of Compliance Operations, to John DeLuca, President of the Wine Institute, Nov. 30, 1988.

In 1993 the ATF signalled its willingness to relax -- or at least to rethink -- its strict stance against health claims for moderate alcohol consumption. Noting that it had received many inquiries on statements regarding the health benefits of moderate drinking, the agency announced its decision to engage in rule-making "to develop more concrete guidelines" on the subject. ATF, Industry Circular 93-8 (Aug. 2, 1993). The possibility of liberalization suggested by this announcement remains only a possibility, as rule-making proceedings have not yet begun. Moreover, there is no assurance that a liberalized policy on the part of the ATF would not be contradicted by Food and Drug Administration (FDA), which has acknowledged authority to regulate health claims on food labels and which has threatened to regulate alcohol beverages as drugs if health claims are made for them. *Id.* At this time, all that can be said with confidence is that the situation is in flux.

The growing scientific evidence in favor of moderate consumption of alcohol is on a collision course with the highly restrictive federal policy on health claims. It may be that conflict can be avoided by regulatory flexibility. The California wine industry hopes for that solution and pledges to work with federal regulatory authorities in a cooperative

spirit. On the other hand, the conflict may lead to litigation. In that event, the courts, and eventually this Court, will have to decide whether and to what extent legal restrictions on scientifically supported health claims for alcohol beverages are consistent with the First Amendment.

For the present, the crucial point is that this important issue not be inadvertently prejudged. This Court should avoid any statements implying unlimited federal regulatory authority over alcohol beverage labeling and advertising. In particular, the Court should reject the Solicitor General's claim that the federal regulation of alcohol beverage labeling and advertising is entitled to "an added presumption of validity, over and above the presumption of constitutionality normally accorded an Act of Congress." Pet. Brief at 17, 37-38. Loose talk of an "added presumption of validity" for alcohol regulation is illogical, unwise, and inconsistent with this Court's precedents on commercial speech. Acceptance of that claim would prejudice the important constitutional question -- not presented here -- whether and to what extent the government can regulate scientifically supported statements on the health benefits of moderate drinking.

ARGUMENT

I. SUPPRESSION OF SCIENTIFICALLY SUPPORTED STATEMENTS ON THE HEALTH BENEFITS OF MODERATE DRINKING RAISES A SUBSTANTIAL FIRST AMENDMENT QUESTION.

As is explained more fully below, the government's claim of an "added presumption of validity" amounts to a bid for carte blanche approval of any regulation of commercial speech regarding alcohol. This claim sweeps far too broadly.

Its approval would effectively prejudice an important issue of constitutional law not now before the Court -- namely, whether and to what extent the government can forbid truthful and informational statements about the health benefits of alcohol.

There is a wealth of scientific data on the health benefits of alcohol. Researchers from the Harvard Medical School recently analyzed some 200 studies and concluded that moderate alcohol consumption is associated with a 25 to 45 percent reduction in the risk of coronary heart disease. JoAnn E. Mason, et al., *The Primary Prevention of Myocardial Infarction*, 326 New England Journal of Medicine 1406-16 (1992). A 1993 study reports that persons who have one or two drinks a day cut their risk of heart attack in half. J. Michael Gaziano, et al., *Moderate Alcohol Intake, Increased Levels of High-Density Lipoprotein and its Subfractions, and Decreased Risk of Myocardial Infarction*, 329 New England Journal of Medicine 1829-34 (1993). There is also evidence that the risk of stroke for lifelong abstainers is more than twice that for moderate drinkers. Helen Rodgers et al., *Alcohol and Stroke: A Case-Control Study of Drinking Habits Past and Present*, 24 Stroke 1473-77 (1993). Perhaps most impressive of all is an analysis of the U.S. government's massive National Health and Nutrition Examination Survey, the largest study of its kind, showing that "moderate drinking increases time until death from any cause by about 3%." Douglas Coate, *Moderate Drinking and Coronary Heart Disease Mortality: Evidence from NHANES I and NHANES I Follow-Up*, 83 American Journal of Public Health 888-90 (1993).

Such references could be multiplied many times over. Even the National Institute on Alcohol Abuse and Alcoholism (NIAAA), which traditionally has been rigidly anti-alcohol, has now recognized the "considerable body of evidence that

lower levels of drinking decrease the risk of death from coronary artery disease." NIAAA, *Alcohol Alert* 2 (Apr. 1992).

Additionally, there is evidence suggesting that wine, especially red wine, may have health benefits not shared by other alcohol beverages. Red wine is rich in chemicals known as phenols or flavonoids. These complex compounds, which give wine its subtle characteristics of taste and smell, also work as antioxidants. Antioxidants may inhibit the oxidation of LDL cholesterol, and over a prolonged period of consumption, may inhibit the formation of fatty deposits on artery walls. Although much work remains to be done in this area, the studies are highly suggestive. See, e.g., E.N. Frankel et al., *Inhibition of Oxidation of Human Low-Density Lipoprotein by Phenolic Substances in Red Wine*, 341 *The Lancet* 454-57 (1993); E.N. Frankel et al., *Inhibition of Human LDL Oxidation by Resveratrol*, 341 *The Lancet* 1103-04 (1993). Significantly, the "Traditional Healthy Mediterranean Diet," recently released by the Harvard School of Public Health (in collaboration with the Oldways Preservation and Exchange Trust and the World Health Organization) recognizes moderate wine consumption as an ingredient in the dietary road to good health.

Despite the accumulating evidence of the health benefits of alcohol beverages generally and wine in particular, the Bureau of Alcohol, Tobacco and Firearms (ATF) maintains a virtual ban on health claims in wine labeling and advertising. Facially, the ATF regulations seem entirely reasonable. They prohibit any representation of therapeutic effect that "tends to create a misleading impression." 27 C.F.R. §§ 4.39(h) and 4.64(i). But the ATF has taken, in its own words, "a very strict view" of the prohibition. ATF, Industry Circular 93-8 (Aug. 2, 1993). As interpreted by the ATF, the regulation bars any statement mentioning the health

benefits of moderate consumption of alcohol, "*even if backed up by medical evidence*" (emphasis added), if such statement "is not properly qualified, does not give all sides of the issue, and does not outline the categories of individuals for whom any such positive effect would be outweighed by numerous negative health effects." ATF, Industry Circular 93-8 (Aug. 2, 1993). No statement of a length suitable for labeling or advertising could possibly meet these requirements. The effect is to convert a gentle-sounding ban on misleading representations to a categorical prohibition of scientifically supported health claims in alcohol labeling and advertising.*

Today, there are some signs that ATF's virtual ban on truthful and informational health claims in alcohol labeling and advertising may be relaxed or redefined. In 1993, ATF reiterated that the dissemination of scientific information "for the purpose of inducing sales" would be illegal, but took the welcome step of clarifying that "the mere transmittal of a scientific or medical article to a newspaper journalist for the purpose of showing both sides of a public issue ... " would no longer be considered a violation of federal law. Letter of William T. Earle, Chief, Industry Compliance Division, to John DeLuca, President of the Wine Institute, Sept. 8, 1993. Additionally, as noted, ATF has announced the intention of engaging in rule-making proceedings "to develop more concrete guidelines with respect to health claims in the labeling and advertising of alcoholic beverages." ATF, Industry Circular 93-8 (Aug. 2, 1993).

*ATF has approved advertising materials that include the full text of April 1992 edition of *Alcohol Alert*, in which the NIAAA for the first time acknowledged the psychological and physiological benefits of moderate drinking. As that text runs to four single-spaced pages, however, it is difficult to conceive of any practical use of it in advertising or labeling.

Rethinking the government's policy in this area has been encouraged by the United States Congress, which recently has prodded federal agencies to investigate the health benefits of alcohol consumption. This year the Senate Committee on Appropriations urged the National Institutes of Health "to support and assist research efforts in these areas, especially the impact of alcohol on cardiovascular health and longevity and on the dietary role of antioxidants and moderate alcohol consumption, and to develop a working strategy to assure future research on this important issue." S. Rep. No. 103-318, 103d Cong., 2d Sess., p. 117 (1994). Identical language was been used by the House Appropriations Committee to the Department of Agriculture. See H.R. Rep. No. 103-542, 103d Cong., 2d Sess., p. 20 (1994). See also H.R. Rep. 103-553, 103d Cong., 2d Sess., pp. 47-48 (1994) (addressing the National Heart, Lung, and Blood Institute).

Despite these admonitions, the Food and Drug Administration (FDA) has signalled that it may wish to maintain a very strict ban against labeling and advertising that notes the health benefits of moderate alcohol consumption, even if ATF does not. Not only does FDA have independent authority to regulate health claims on food products, but it has threatened to regulate alcohol beverages as drugs if curative, therapeutic, or disease prevention claims are made for them. See ATF, Industry Circular 93-8 (Aug. 2, 1993).

Thus, it is most unclear whether and to what extent the federal ban on statements regarding the health benefits of moderate alcohol consumption will be relaxed. In the face of overwhelming evidence that important health benefits do exist, the ATF may choose to modify its restrictive policy -- or it may not. It may choose to recognize the industry's legitimate interest in disseminating truthful, scientifically supported, and highly relevant health information to

consumers who can use it -- or it may not. And ATF's revised policy (whatever it may prove to be) may be undermined by new regulations imposed by the FDA -- or it may not.

In these circumstances, no one can say with confidence whether a conflict will develop between the First Amendment rights of alcohol beverage producers and consumers and the government's restrictive policy on labeling and advertising of health claims, or whether any such conflict will lead to litigation. If it does lead to litigation, the federal courts will be faced with a novel and difficult question of constitutional law, the exact contours of which cannot now be foreseen.

II. THE GOVERNMENT'S CLAIM OF AN "ADDED PRESUMPTION OF VALIDITY" FOR REGULATION OF ALCOHOL LABELING AND ADVERTISING IS ILLOGICAL, UNWISE, AND CONTRARY TO THE PRECEDENTS OF THIS COURT.

The Wine Institute, on behalf of the California wine industry, does not ask this Court to resolve the question of constitutional protection for scientifically supported statements on the health benefits of moderate drinking. On the contrary, the Wine Institute respectfully asks the Court *not* to resolve this issue -- at least not until such time as the considerations on both sides have been developed through the normal processes of litigation.

There is real danger that the question of constitutional protection for scientifically supported health claims may be inadvertently prejudged by the decision in this case. The Solicitor General creates that risk by claiming that government regulation of alcohol labeling and advertising is entitled to an "added presumption of validity, over and above

the presumption of constitutionality normally accorded an Act of Congress" Pet. Brief at 17. Regardless of how the instant case is resolved, this argument should be rejected. It is illogical, unwise, and inconsistent with a proper understanding of this Court's precedents on commercial speech.

The idea of an added presumption of validity for suppression of commercial speech relating to alcohol is illogical, because it counts the government's interest twice. Under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), the government interest in regulating commercial speech must be "substantial." *Id.* at 566. No one doubts that the regulation of "socially harmful activity" (Pet. Brief at 38-41) is a substantial state interest. And no one doubts that alcohol abuse is a socially harmful activity. (Presumably, every activity that the government seeks to regulate is socially harmful, or there would be no point in regulation.) It therefore follows that the government has, as *Central Hudson* requires, a "substantial" interest in regulating labeling and advertising that would promote alcohol abuse.

But the government claims an *added* presumption of validity for the regulation of speech promoting socially harmful activity. Logically, that counts the government's interest in inhibiting socially harmful activity twice -- once to create the "substantial" government interest required by *Central Hudson* and again to support the "added" presumption of validity claimed by the Solicitor General. The effect of this double-counting is to make the existence of a socially harmful activity (which presumably will appear in every case) an independently sufficient basis for suppressing commercial speech. It is a fancy way of saying that a substantial interest is *all* that the government need show to

sustain its regulation. As an interpretation of *Central Hudson*, that reasoning is plainly illogical.

More importantly, it is unwise. As has been noted, there is ample evidence of the health benefits of moderate alcohol consumption, especially of wine. As the scientific research becomes more conclusive, the potential conflict between the First Amendment rights of wine producers and consumers and the highly restrictive government policy on health claims becomes more acute. The Court should address this conflict only if and when it becomes necessary to do so and only on the basis of a fully developed factual record. It should not prejudge the issue by endorsing the government's request for carte blanche approval of anything it might choose to do in regulating commercial speech regarding alcohol.

Finally, the suggestion of an added presumption of validity is inconsistent with a proper understanding of this Court's precedents. The government's argument is based chiefly on *California v. LaRue*, 409 U.S. 109 (1972), where the Court referred to an "added presumption" of the validity of state laws prohibiting nude dancing in establishments licensed to sell liquor. That presumption was said to come from the Twenty-first Amendment, which makes state law paramount in the regulation of alcohol beverages.

There was, from the outset, something odd about this idea. The Twenty-first Amendment does indeed create an added presumption of the validity of state law as against the federal commerce power. On that much, history is clear. See *Craig v. Boren*, 429 U.S. 190, 205-06 (1976) (and cases cited therein). But the notion that the Twenty-first Amendment created an added presumption of the validity of state law as against civil liberties, is rather plainly unfounded. Nothing in that provision's language or origins

suggests that it was intended to curtail rights guaranteed elsewhere in the Constitution. See Paul Brest, *Processes of Constitutional Decisionmaking, Cases and Materials* 258 (1975) ("Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights")

Moreover, the precedents on the effect of the Twenty-first Amendment on civil liberties are strangely mixed. On the one side are *LaRue* and its progeny, *City of Newport v. Jacobucci*, 479 U.S. 92 (1986) (per curiam), and *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) (per curiam). On the other side are several decisions ruling that the Twenty-first Amendment does not affect civil liberties. See *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982); *Craig v. Boren*, 429 U.S. 190 (1976); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

The apparent inconsistency is resolved by attention to context. *LaRue* and its progeny involved nude dancing. As this Court has subsequently had occasion to clarify, nude dancing is, in terms of the First Amendment, low-value speech. As Chief Justice Rehnquist said in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 561 (1991), nude dancing is "only marginally" within the "outer perimeters" of the First Amendment. *Id.* at 566. Moreover, *LaRue* and its progeny involved laws prohibiting nude dancing only in establishments licensed to serve liquor. As *Barnes* demonstrates, the prohibitions could be upheld under the general police power without reference to the Twenty-first Amendment. The "added presumption" language of *LaRue* was, therefore, entirely unnecessary. At most, it stands for something far narrower and more context-specific than the broad principle urged by the government.

Moreover, the government's claim of an added presumption of validity for government regulation of alcohol

labeling and advertising directly conflicts with this Court's precedents on commercial speech. The controlling case is *Central Hudson*, which states the four-part test for government regulation of commercial speech: (1) the speech must be lawful and not misleading; (2) the government interest must be substantial; and the regulation must (3) directly advance that interest and (4) not be more extensive than necessary. 447 U.S. at 556.

The government's claim of an added presumption of validity for laws regulating alcohol labeling and advertising would pull the teeth of *Central Hudson*. As careful analysis shows, the effect would be to eliminate the third and fourth requirements, thus relieving the government of the obligation to show *any* means-ends fit in regulating commercial speech.

With respect to the first requirement (lawful and not misleading), the added presumption is simply not relevant. Speech that does not have these characteristics can be suppressed -- period. With respect to the second requirement (substantial interest), the added presumption adds nothing. Either the government's interest is substantial -- in which case that part of the test is satisfied and nothing additional need be said -- or it is not substantial -- in which case no added presumption of validity could possibly arise. It is with respect to the third and fourth requirements (directly advance and not more extensive than necessary) that an added presumption of validity would operate. It would dispense with the third and fourth requirements, or at least reduce them to formalities. The proof of a substantial interest would become an independently sufficient basis for suppressing commercial speech, without regard to the means-ends requirements that the *Central Hudson* opinion so painstakingly set forth.

In short, the government's claim of an added presumption of validity would gut *Central Hudson's* detailed four-part test and replace it with carte blanche approval of government regulation whenever alcohol is involved. That approach sweeps much too broadly. It is a quick-triggered solution to a broad range of problems not now before the Court, specifically those involving the health benefits of moderate drinking, and it fundamentally contradicts this Court's careful attention to the First Amendment values of truthful and informational commercial speech.

CONCLUSION

The question before the Court is a narrow one and should be narrowly resolved. It should not become the occasion for a blanket "added presumption of validity" that would effectively prejudge the merits of difficult constitutional questions not now before the Court.

Respectfully submitted,

JOHN C. JEFFRIES, JR.
Counsel of Record
University of Virginia
School of Law
Charlottesville, VA 22903
(804) 924-3436
(804) 924-4750 (fax)

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IN THE
Supreme Court of the United States
OCTOBER TERM 1994

LLOYD BENTSEN, SECRETARY OF THE TREASURY,
Petitioner,

v.

COORS BREWING COMPANY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

**BRIEF OF AMICUS CURIAE PUBLIC CITIZEN
IN SUPPORT OF RESPONDENT**

David C. Vladeck
(Counsel of Record)
Ann M. Begley
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 833-3000

Attorneys for Amicus Curiae

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On Writ of Certiorari to the
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**BRIEF OF AMICUS CURIAE PUBLIC CITIZEN
IN SUPPORT OF RESPONDENT**

Amicus curiae Public Citizen, Inc., files this brief with the consent of the parties because of the vital First Amendment and public health concerns at stake in this case. In our view, there can be no question that the ban imposed by section 205(e)(2) of the Federal Alcohol Administration Act ("FAAA"), 27 U.S.C. § 205(e)(2), which prohibits the disclosure of the alcohol content of malt beverages on their labels unless that disclosure is explicitly mandated by state law, violates the First Amendment. Truthful, non-deceptive information that empowers consumers to make informed

choices that directly affect their health and well-being and the safety of others may not be suppressed absent the most compelling of reasons. Although the interest that the government claims is furthered by the ban -- the prevention of "strength wars" among competing brewers -- is perhaps a valid one in the abstract, there is no support for the assertion that Congress had this interest in mind when it enacted the FAAA, nor is the labeling ban even a remotely reasonable way to achieve that end. Accordingly, this Court should affirm the ruling below.

INTEREST OF AMICUS AND SUMMARY OF ARGUMENT

Amicus Public Citizen is a national public interest organization, with over 125,000 members. For 23 years, Public Citizen has worked to obtain and disseminate information relating to the price, safety, and quality of foods, drugs, medical devices, automobiles and other products and services so that consumers can make informed decisions in their purchases. This case is about such a product -- beer, which many Public Citizen members consume. And like most consumers, Public Citizen's members have a legitimate interest in being able to distinguish among beers and other malt beverages on the basis of alcohol content.

Not only has Public Citizen long been active in matters relating to public health, but it has also been in the vanguard in pressing for extending constitutional protections for *truthful* commercial speech. For example, Public Citizen's lawyers represented the consumer plaintiffs in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), and have handled two more recent commercial speech cases in this Court, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and *Edenfield v. Fane*, 113 S. Ct. 1792 (1993). They also filed *amicus* briefs in a number of other commercial speech cases, including *Peel v. Attorney Registration and Disciplinary*

Comm'n of Ill., 496 U.S. 91 (1990), *In re Primus*, 436 U.S. 412 (1978), *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), and *Bates v. State Bar of Arizona*, 433 U.S. 733 (1977).

Public Citizen files this brief because it is concerned that the interests of those who have the most at stake in this proceeding -- beer drinkers who may wish to moderate their alcohol consumption -- may not stand out in the parties' more comprehensive treatment of the legal issues before the Court. We do not seek to duplicate or repeat the arguments that will be put forth by respondent. Rather, we seek to highlight three main points:

First, the government's position depends on the long-rejected proposition that government-enforced ignorance is acceptable under the First Amendment -- a proposition that we believe was laid to rest in *Virginia Board of Pharmacy*. As this Court has repeatedly said, it is for "the speaker and the audience, not the government[, to] assess the value of the information presented." *Edenfield*, 113 S. Ct. at 1798. Here, of course, the government's sole justification is that armed with information about alcohol content, consumers will almost invariably make the "wrong" choice and select the more potent beverage. Blatant paternalism of this sort runs counter to fundamental First Amendment values and should not be tolerated.

Second, the government's effort to ratchet down the level of scrutiny to be applied should be rejected out of hand. The government argues that the constitutionality of the ban should be sustained if it can show that Congress had a "reasonable belief" at the time the labeling ban was enacted that the ban would ward off strength wars. Not only does the government's proposed "reasonable belief" standard fly in the face of prior cases which reject the idea that in First Amendment cases courts should blindly defer to legislative judgments, but there simply is no support for the

government's assertion that Congress enacted the labeling ban to prevent strength wars.

Third, even assuming that Congress enacted the labeling ban to deter strength wars, the ban must still fall because there is little correlation between the Congress' goal and the categorical ban it has imposed. Indeed, there are far more direct ways to discourage strength wars that do not abridge the First Amendment rights of consumers and brewers.

ARGUMENT

THE LABELLING BAN IS UNCONSTITUTIONAL.

A. Paternalistic Restrictions on the Disclosure of Truthful, Non-Misleading Information Violate the Principles Established in *Virginia Board of Pharmacy* and Harm Consumers.

In holding that commercial speech is entitled to substantial protection under the First Amendment, this Court has recognized "that the free flow of commercial information is indispensable ... to the proper allocation of resources in a free enterprise system ... [and] to the formation of opinions as to how that system ought to be regulated or altered." *Virginia Board of Pharmacy*, 425 U.S. at 765. Thus, "[t]he commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish." *Edenfield*, 113 S. Ct. at 1798. "Commercial expression not only serves the economic interests of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-62 (1980). *See also Edenfield*, 113 S. Ct. at 1798 (First Amendment coverage of commercial speech is designed to safeguard "societal interests in broad access to complete and accurate commercial information.")

Ever since *Virginia Board of Pharmacy*, it has been clear that this Court has little tolerance for government-imposed prohibitions based on the theory that it is "better" to keep the public in the dark about truthful, non-deceptive information. In *Pharmacy Board*, the Court reasoned that the state's interest in suppressing the advertising of prescription drugs "is a protection based in large part on public ignorance." 425 U.S. at 769. Rejecting the state's "paternalistic approach" of government-enforced ignorance, the Court stressed the common-sense idea that "people will perceive their best interest if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Id.* at 770; *see also Edenfield*, 113 S. Ct. at 1798 (this Court's cases reflect the preference that "the speaker and the audience, not the government, assess the value of the information presented.")

The government's rationale for enforced ignorance in this case is no more compelling than the one flatly rejected by the Court in *Virginia Pharmacy Board*. Just as consumers have a legitimate interest in the price of prescription drugs, they have a legitimate interest in knowing the alcohol content of the beer they consume. An illustration will make this clear.

Suppose Mary P. Smith goes to her supermarket to shop. Stopping at the cereal section, she carefully reads the labels on two brands of corn flakes to see which one contains more of the iron her doctor told her she needs. After learning that the iron content in corn flakes varies widely, she chooses the brand highest in iron. On her way out of the store, Mary stops to pick up a six-pack of beer. She likes to keep beer on hand for friends, but hates to see them leave her house intoxicated. She examines the cans for information on alcohol content, but finds none. Next she asks the store manager which beer has a moderate or low alcohol content, but the manager does not know either, although he has heard rumors about the potency of various

brands. Unwilling to buy beer without knowing its alcohol content, Mary picks up a bottle of white wine (clearly labeled, as is required by the FAAA, "Alcohol 13.2%, by volume"), and leaves the store, perplexed.¹

Mary is only one of millions of perplexed consumers. Except for those who purchase beer in the ten states that require alcohol content disclosure, consumers have no practical means of obtaining information about the potency of beers, a dangerous situation given that commercial beers range in alcohol by volume content from about 3% to 9%. Perpetuating public ignorance about alcohol content of beer, and thus eliminating public choice, guarantees only that beer will be consumed unwisely. In light of public concerns about alcoholism, drunk driving, and calorie consumption (which is related directly to alcohol content), it is likely that some consumers, if not most, would use alcohol content information to *reduce* their alcohol intake. Under the present law, they are denied even the opportunity to make that responsible decision. This information gap can pose a hazard to both beer drinkers and the public at large. For example, a person who drives to a party might seek to moderate his or

¹ It is highly ironic that the government defends the alcohol labeling ban on beer at precisely the same time the government has shown an increased appreciation of the rights of consumers to know the nutritional contents of foods. Under the recently enacted Nutrition Labeling and Education Act of 1990 ("NLEA"), Pub. L. No. 101-535, 104 Stat. 2353, virtually all food products sold in the United States will have to bear a comprehensive label disclosing a broad array of nutritional information. See 21 U.S.C. § 343(q) (1994 Supp.). Public Citizen believes that Congress should revisit the question of alcohol labeling, and using the NLEA as a model, require the comprehensive labeling of all alcohol products, so that the public may make meaningful comparisons, not only within product types — like malt beverage — but also among products, such as a disclosure of alcohol content per routine serving.

her alcohol consumption. Yet, because of the labeling ban, that person is not likely to appreciate that drinking two beers with an alcohol volume of 8% is the equivalent of consuming five beers that have an alcohol volume of 3.2%.

This result is intolerable. As we show below, if there is any force to the government's concern about "strength wars," which we doubt, they can be addressed by direct means that do not infringe the First Amendment rights of consumers and brewers. But keeping the public in the dark about truthful, non-misleading information that affects their safety and well-being is, after *Virginia Board of Pharmacy*, indefensible.

Finally, it bears emphasis that the governmental justification here is far weaker than that asserted in any prior commercial speech case. Unlike most commercial speech cases that have involved efforts to suppress speech that was allegedly false, misleading or deceptive -- e.g., *Ibanez v. Board of Accountancy*, 114 S. Ct. 2084 (1994); *Edenfield*; *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) -- here, the government concedes that the speech it seeks to suppress is completely truthful, accurate, and non-deceptive. As the Court held last Term in *Ibanez*, it is hard to "imagine how consumers can be misled by ... truthful representation[s]." 114 S. Ct. 2089.

Nor is this case like either *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986) or *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993). The advertising prohibitions at issue in those cases were justified by the government's concededly legitimate interest in discouraging residents from engaging in the underlying conduct that was to be encouraged by the advertising -- namely, gambling. Here, of course, the government has disavowed any interest in discouraging Americans from drinking beer; indeed, it freely permits advertising aimed at *increasing* demand for beer and other malt beverages. Thus,

the rationale of *Posadas* and *Edge* does not rescue the ban at issue here.

B. The Government's Proposed "Reasonable Belief" Test Cannot Be Squared With Basic Commercial Speech Jurisprudence.

In *Central Hudson*, this Court announced that the "party seeking to uphold a restriction on commercial speech carries the burden of justifying it." 447 U.S. at 570. "This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Edenfield*, 113 S. Ct. at 1800 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648-49 (1985)).

The government apparently recognizes that it cannot shoulder its burden in this case. Instead, the government seeks to be relieved of its burden by arguing that, because it has a strong interest in promoting moderation in alcohol consumption, all it must show to prevail is that Congress had a reasonable belief that the ban was needed when it was enacted. U.S. Br. at 35. Congress' reasonable belief, the government argues, is enough to satisfy the pivotal components of the *Central Hudson* test, namely that the ban is narrowly tailored to directly further the ends the government seeks to achieve. *Id.*

This argument should be rejected for several distinct, albeit related, reasons. First, the government's argument seeks to conflate the narrow tailoring requirement in commercial speech cases with the rational basis test -- a proposition this Court flatly rejected in *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 n.13 (1993); *Board of Trustees v. Fox*, 492 U.S. 478, 480-82 (1989) for good reason. First Amendment review requires that the government regulate with a high degree of precision that is

not required under rational basis review, a point this Court underscored in both *Discovery Network* and *Fox*.²

Second, the standard the government proposes would give it free reign to abridge citizens' fundamental rights to receive commercial information on the basis of mistakes, misconceptions, and outmoded or out-of-date justifications. Surely the restraints struck down in cases like *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), would have survived the government's proposed "reasonable belief" analysis. The government's approach would run directly counter to this Court's insistence that categorical restraints on commercial speech be carefully scrutinized.

Third, the government's "reasonable belief" test would be difficult to apply in practice, since it seeks to cut judicial review loose from the evidentiary moorings identified in *Edenfield* and to replace them with a far less rigorous assessment of whether the Legislature, rightly or wrongly (so long as "reasonably"), believed that there was a reasonable fit between the ends it sought to achieve and the means it selected. Indeed, what the government is actually proposing is a lenient standard of review which is dependent on the government's policy judgment regarding the value of the

² The government claims that its "reasonable belief" theory draws support from this Court's opinion in *Posadas*, which the government contends suggests that advertising about "a socially harmful activity ... warrants even less protection under the First Amendment than other forms of commercial speech." U.S. Br. at 41. Nothing in *Posadas* supports the proposition that this Court was creating a hierarchy of values within the commercial speech field, let alone establishing multiple standards of review for assessing restraints on commercial speech. In fact, the *Posadas* Court dutifully applied the *Central Hudson* test. The government's argument is also flawed for the reasons discussed above, since here, unlike in *Posadas*, the ban is not directed at an activity that the government seeks to discourage.

underlying activity or the risk that the activity poses. This standard is far too malleable to be workable in practice. Suppose Congress sought to ban all advertising for "gas guzzling" cars to promote fuel efficiency. Would a reviewing Court have to defer to Congress' "reasonable belief" that the ban furthers a substantial governmental interest, or would a reviewing Court apply the *Central Hudson* test and insist that the government actually show that there was a direct correlation between the means and ends?

In our view, this Court should reject the government's effort to evade strict application of *Central Hudson*. There is no reason to believe that the *Central Hudson* test opens the floodgates to too much commercial speech or that it needs to be overhauled. Cf. *Edenfield*, 113 S. Ct. at 1804 (Blackmun, J., concurring). To the contrary, where the government seeks to impose strict regulations on a hazardous activity, that factor enters into the *Central Hudson* calculus when the Court assesses whether the government has a substantial interest in limiting it. Demonstrating a substantial interest, however, hardly gives the government license to use categorical restraints where far less onerous and more direct means are available, as this Court made crystal clear in *Fox* and *Discovery Network*.

There is one final point worth noting about the government's argument: even were the Court to apply the lenient standard of scrutiny the government urges, that still would not salvage the government's case. The government has argued that the purpose of the ban is to prevent "strength wars" based on truthful statements of alcohol content. However, nothing in the language of section 205(e)(2) suggests that Congress had "strength wars" in mind when it enacted the provision. Likewise, the legislative history of section 205(e)(2) suggests that Congress' focus was not on the danger of truthful communications -- which is the only type of communication at issue in this case -- but on the danger of deceptive advertising. The House Report identified concerns about "unscrupulous advertising" and

"deceptive labeling practices" and noted that statements about alcohol content were proliferating "irrespective of th[e] falsity of such statements." H.R. Rep. No. 1542, 74th Cong., 1st Sess. 12-13 (1935). No mention is made of "strength wars." The Senate Report is to the same effect. S. Rep. No. 1215, 74th Cong., 1st Sess. at 6-7 (1935).

This history suggests that Congress' chief concern was not that the dissemination of *accurate* information would somehow encourage strength wars. Rather, Congress appears to have been troubled about inaccurate and deceptive labeling -- problems which the government has the power and ability to control. Indeed, Coors does not, and, we submit, could not plausibly contest statutory restrictions on the use of descriptions like "strong," "high-test," or "dynamite" on labels or in advertising. Thus, the government's case rests on the false premise that section 205(e)(2) is aimed at staving off strength wars. Because the ban does not advance any substantial governmental interest, but rather deprives consumers of important information, the labeling ban cannot stand.³

³ There are other reasons to doubt that Congress imposed the labeling ban to avert "strength wars." For one thing, the ban's purported rationale would seem to apply equally to all types of alcoholic beverages, yet the ban applies only to beer and not to wine or spirits. As the Court recently explained in *City of LaDue v. Gilleo*, 114 S. Ct. 2038, 2044 (1994), inconsistent regulation in the First Amendment area "may diminish the credibility of the government's rationale for restricting speech in the first place." The exception for states laws mandating the disclosure of alcohol content also undermines this theory. Furthermore, if the strength war theory were plausible, the absence of alcohol content labeling ought to steer a high percentage of malt beverage buyers to the potent "malt liquors," which contain more alcohol than ordinary beer. But the statistics show that "malt liquors" capture only a very small fraction of the market, especially when contrasted with the low alcohol beers.

C. The Ban Fails The Narrow Tailoring Requirement Of *Central Hudson*.

The final element of the *Central Hudson* test is whether the regulation is "narrowly tailored to achieve the desired objective." *Fox*, 492 U.S. at 480. Here, the government carries an especially "heavy burden of justifying" the restriction because it imposes a "categorical prohibition against the dissemination of accurate factual information to the public." *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91, 109 (1990).

The government has not met its burden. The labeling ban proscribes far more speech than is necessary, particularly in light of the fact that the information at stake is entirely truthful and non-deceptive, and has considerable value to consumers seeking to exercise responsible judgment about their alcohol consumption. Indeed, the government cannot deny that many, if not the overwhelming majority of consumers, would use information relating to alcohol content in a responsible fashion.

Notwithstanding the evident value of this information to consumers, the government argues that all consumers should be deprived of this information because *some* beer drinkers might choose beers based on their high-alcohol strength, and that the ban is needed to forestall a "strength war" aimed at that segment of the beer-buying public. U.S. Br. at 35. Given the growing stigma attached to alcohol abuse, and the increasingly stiff criminal penalties that are imposed for public intoxication and driving under the influence of alcohol, we question how many beer drinkers would choose a beer solely on the basis of its high alcohol content. Nonetheless, even assuming that this was the goal Congress had in mind when it enacted section 205(e)(2) -- which we doubt -- simply denying consumers ready access to information about alcohol content is at best a perverse way to achieve Congress' goal, if not the most oblique route imaginable. Congress had numerous and obvious less-

burdensome alternatives to the labeling ban, yet there is no evidence that Congress even considered them.⁴

First, as the government recognizes, Congress could impose strict limits on the amount of alcohol any product that identifies itself as "beer" may contain. The federal government prescribes "standards of identity" for products in many contexts to prevent consumer deception and fraud, *see, e.g.*, 21 U.S.C. § 341, and this approach would guarantee that "strength wars" would not erupt. The government's half-hearted explanation as to why Congress eschewed this approach -- namely, that it wished to avoid interfering with state regulation of alcohol -- misses the mark because Congress could have expressly allowed for superseding state law, just as it did in section 205(e)(2).

Second, the government could impose differential taxes based on the alcohol content of malt beverages, similar to the differential tax already imposed on wine based on alcohol content. *See* 21 U.S.C. § 5041. This too would strongly discourage "strength wars."

Third, the government could regulate speech relating to alcohol strength with greater precision to ensure that brewers did not make any representations in their advertising touting the strength of their beers. We submit that the availability of these and other alternatives -- never considered by Congress -- show that the labeling ban fails the "reasonable fit" inquiry prescribed by *Central Hudson*, and for that reason as well, the judgment below should be affirmed.

⁴ In this respect, the labeling ban is far more problematic for consumers than the advertising ban at issue in *Virginia Board of Pharmacy*. At least in that case, consumers could find out about the price of prescription drugs, although consumers would have to canvass their local pharmacies to determine price. Here, the ban is virtually an absolute one, since a consumer could not learn the alcohol content of a particular malt beverage from either the label or the vendor.

CONCLUSION

For the reasons set forth above, the judgment below should be affirmed in all respects.

Respectfully submitted,

David C. Vladeck
(*Counsel of Record*)
Ann M. Begley*
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 833-3000

Attorneys for *Amicus Curiae*

September 16, 1994

* Ms. Begley is awaiting admission to the Bar of the Commonwealth of Virginia. Counsel wish to acknowledge the assistance of Fred Bernstein, a recent graduate of New York University School of Law.

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—v.—

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Respondent.

**BRIEF AMICI CURIAE ON BEHALF OF RESPONDENT
SUBMITTED BY THE ASSOCIATION OF NATIONAL
ADVERTISERS, INC.; THE NATIONAL ASSOCIATION
OF BROADCASTERS; THE AMERICAN ASSOCIATION
OF ADVERTISING AGENCIES; and THE AMERICAN
ADVERTISING FEDERATION**

John F. Kamp
American Association of
Advertising Agencies
1899 L. Street, N.W.
Washington, D.C. 20036

Attorney for A.A.A.A.

Jeffrey Perlman
1101 Vermont Ave., N.W.
Suite 500
Washington, D.C. 20005

Attorney for AAF

Burt Neuborne
40 Washington Square South
New York, New York 10012
(212) 998-6172

*Attorney for Amici Curiae
(Counsel of Record)*

Gilbert H. Weil
60 East 42nd Street
New York, New York 10165

Attorney for A.N.A.

Henry L. Bauman
Valerie Schulte
National Association of
Broadcasters
1771 N. St., N.W.
Washington, D.C. 20036

Attorneys for N.A.B.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1631

LLOYD BENTSEN,

Petitioner,

—v.—

COORS BREWING COMPANY,

Respondent.

**BRIEF AMICI CURIAE ON BEHALF OF RESPONDENT
SUBMITTED BY THE ASSOCIATION OF NATIONAL
ADVERTISERS, INC.; THE NATIONAL ASSOCIATION
OF BROADCASTERS; THE AMERICAN ASSOCIATION
OF ADVERTISING AGENCIES; and THE AMERICAN
ADVERTISING FEDERATION**

Interest of Amici Curiae

The Association of National Advertisers, Inc., (A.N.A.), the National Association of Broadcasters (N.A.B.), the American Association of Advertising Agencies (A.A.A.A.), and the American Advertising Federation (AAF) respectfully submit this brief *amici curiae* in support of respondent. Written consents to its filing have been granted by the parties and filed with the Clerk of the Court.

The Association of National Advertisers, Inc., the advertising industry's oldest trade association, is the only organization exclusively dedicated to enhancing the ability of businesses to advertise on a national and regional basis. With more than 2,000 subsidiaries, divisions and operating units, A.N.A. members market a kaleidoscopic array of goods and services and account for almost 80% of the nation's annual national and regional advertising expenditures. As the nation's principal community of commercial speakers, A.N.A. has long been committed to the advancement of truthful commercial speech designed to permit consumers to make informed and autonomous choices in the marketplace.

The National Association of Broadcasters (N.A.B.), organized in 1922, is a non-profit incorporated trade association that serves and represents radio and television stations and networks. N.A.B. seeks to preserve and enhance its members' ability to disseminate freely information concerning commercial activities, the activities of government and other matters of public concern. N.A.B. and its members oppose the use of government censorship of truthful information about lawful activity as a tool to manipulate the behavior patterns of the American public.

The American Association of Advertising Agencies (A.A.A.A.) is the national trade association of the advertising agency industry, representing more than 750 advertising agencies throughout the United States. Members of A.A.A.A. create and place approximately 80% of all national advertisements, as well as significant portions of regional and local advertising. A.A.A.A. is dedicated to the preservation of a robust free market in commercial ideas.

The American Advertising Federation (AAF) is a national trade association representing virtually all elements of the advertising industry. Among AAF's members are companies that produce and advertise consumer products, advertising agencies, magazine and newspaper publishers, radio and tele-

vision broadcasters, outdoor advertising organizations, and other media. AAF members also include twenty-one national trade associations; more than 200 local professional advertising associations with 52,000 members; and more than 200 college chapters with more than 6,000 student members. AAF members use almost all forms of media to advertise products and communicate with consumers throughout the United States.

Introductory Statement and Summary of Argument

In the teeth of a generation of Supreme Court precedent holding that consumers have a First Amendment right to receive uncensored commercial information, petitioner seeks, in this case, to keep consumers in ignorance by censoring the label on a lawful product. If, argues petitioner, consumers are provided with accurate information about product attributes deemed "socially undesirable" by the state, they may base their purchasing decisions on them. If, on the other hand, the state prevents the dissemination of such "dangerous" information by deleting it from a product's label, consumers will be spared the temptation to behave in ways the state brands as "socially undesirable". In other words, petitioner offers Americans better living through censorship.

In this case, the so-called dangerous information is the amount of alcohol in a bottle of beer. But petitioner's theory of paternalistic censorship cannot be limited to beer. Fears that some consumers are overly concerned with driving too fast would equally justify a ban on accurate information about a car's horsepower, or a gasoline's octane. Fears that some investors are too concerned with a quick profit would justify a ban on accurate data about short term economic performance. Indeed, under the government's theory, consumers can even be denied accurate information about lower prices in order to "protect" them against "socially undesirable" purchases.

The invitation to use state-mandated ignorance as a paternalistic behavior modification device breaks down on multiple levels. First, and most importantly, *amici* believe that consumers have an absolute First Amendment right to receive uncensored, accurate information about lawful products they are about to buy. In a free society, individuals have a right to uncensored, accurate information needed to make lawful choices—economic, social and political. If the majority believes that a given choice is “socially undesirable”, government may argue against it; government may even ban the choice entirely. Government may not, however, purport to leave a choice free, but sabotage its exercise by censoring truthful information needed to make it. Since the First Amendment forbids the state from using government-mandated ignorance as a regulatory policy, the assertion by petitioner that American consumers cannot be trusted with the truth about a lawful product they are about to buy does not even qualify as a legitimate government interest within the meaning of *Central Hudson Gas & Elec. Corp. v. Public Service Comm’n*, 447 U.S. 557 (1980).

Second, if government is ever empowered to deny consumers access to truthful commercial speech about a lawful product, it must, at a minimum, demonstrate an extremely strong government interest in censorship to overcome a consumer’s obvious interest in knowing the truth about a product she is about to buy. Under *Central Hudson*, the government must demonstrate three things: (1) that the speech in question poses a risk of serious harm; (2) that the harm will be materially and directly alleviated by censorship; and (3) that the regulation does not censor more speech than necessary. In this case, petitioner cannot satisfy any of the *Central Hudson* prerequisites. Petitioner’s claim that the speech ban is needed to forestall socially undesirable “strength wars” among brewers seeking to market beer on the basis of alcohol content is not supported by the historical evidence, by evidence of contemporary practice, or by the experience of the wine and dis-

tilled spirits industries, both of which disclose alcohol content on labels without the adverse consequences predicted by petitioner¹. In fact, accurate information about alcohol content is more likely to lead many contemporary consumers to seek beer with a lower alcohol content.

Moreover, even if one erroneously assumes that a real threat of strength wars exists, the government’s prophylactic approach results in far more censorship than necessary.

Finally, the assertion by the United States of nationwide regulatory authority over malt beverage labels is based on an untenable reading of Sections 205 (e) and (f) the Federal Alcohol Administration Act. The 1935 Act sought, *inter alia*, to regulate unfair trade practices in the alcohol beverage industry. Section 205(e)(2) governs labeling. Section 205(f)(2) governs advertising. But the applicability of both sections to malt beverages is conditioned by a proviso in section 205(f) stating that the provisions of (e) and (f) apply only in those states that have enacted “similar” rules governing intra-state transactions. At most, therefore, the federal regulations at issue in this case apply in 20 states and the District of Columbia. Petitioner’s persistent attempt to impose 205(e) in the 30 states where it does not apply belies the government’s effort to disguise its use of the statute as an exercise in cooperative federalism.

¹ Under the Federal Alcohol Administration Act, distilled spirits must disclose alcohol content on the label. Wines with less than 14% alcohol content may disclose alcohol content on the label. Wines with more than 14% alcohol content must disclose alcohol content on the label. 27 U.S.C. 205(e)(2) (hereafter cited as 205(e)(2)).

I.

THE UNITED STATES IS PROCEEDING UNDER AN INDEFENSIBLE READING OF ITS LEGISLATIVE AUTHORITY. AS CONSTRUED BY PETITIONER, SEC. 205(e) IMPROPERLY IMPOSES FEDERAL REGULATION ON AT LEAST 30 STATES.

Petitioner inaccurately characterizes its reading of Sec. 205(e)(2)² as an exercise in cooperative federalism designed to reflect and reinforce the regulatory judgments of all 50 states and the District of Columbia. As such, petitioner claims that Sec. 205(e) is entitled to deferential treatment as an effort to implement the states' rights philosophy of the 21st Amendment. *Brief for Petitioner*, at 41-45. As construed by the United States, however, Sec. 205(e) does not defer to state regulatory judgments. Rather, as construed by petitioner, Sec. 205(e) improperly imposes federal regulation on 30 states in flat contravention of the policies underlying the 21st Amendment.

Petitioner has repeatedly argued that the federal prohibition imposed by 205(e)(2) is in force in all 50 states and the District of Columbia. *Brief for Petitioner*, at n.4 and pp. 9-11. In 20 states and the District of Columbia, the United States notes that the applicability of 205(e)(2) is triggered by state laws imposing parallel regulations on intra-state beer transactions.³ In 20 states, the government argues that a state's failure to have enacted any regulations governing intra-state beer transactions constitutes acquiescence in the federal ban through silence.⁴ In 10 states, the government apparently argues that

² The operative language of section 205(e)(2) forbids labels on malt beverages containing:

"... statements of, or statements likely to be considered as statements of, alcoholic content of malt beverages . . . unless required by state law."

³ The jurisdictions are listed in the *Brief for Petitioner* at n. 7.

⁴ The jurisdictions are listed in the *Brief for Petitioner*, at n.9.

the federal ban applies interstitially, supplementing state laws requiring disclosure of alcohol content above or below a fixed amount.⁵

But petitioner's long-standing assertion of nationwide regulatory authority under 205(e) cannot be defended. In fact, the labeling restrictions imposed by petitioner under 205(e)(2) should be inapplicable in the 20 states that have remained silent on the issue of disclosure of alcohol content; should be inapplicable in the 10 states that have enacted legislation mandating disclosure above or below given amounts of alcohol; and may well be inapplicable in at least some of the remaining 20 states.

Petitioner's so-called exercise in cooperative federalism ignores the proviso added to 205(f) by the Conference Committee in 1935, which states:

"In the case of [interstate] malt beverages, the provisions of this subsection [governing advertising] and subsection (e) of this section [governing labeling] shall apply . . . only to the extent that the law of [a] State imposes similar requirements with respect to the labeling or advertising, as the case may be, of [intra-state] malt beverages" (material in brackets added).

Petitioner recognizes that the 205(f) proviso precludes the application of the advertising regulations imposed by section 205(f)(2) in those states that have not enacted the required parallel state legislation. *Brief of Petitioner*, at n.4. Petitioner denies, however, that the proviso imposes an identical geographical limitation on federal power to regulate labels. *Brief of Petitioner*, at n.4. Petitioner apparently believes that the language in section 205(e)(2) banning disclosure of alcohol content "unless required by state law" avoids the 205(f) proviso by making a state's silence the equivalent of positive state adoption of the federal legislation.

⁵ The jurisdictions are listed in the *Brief for Petitioner*, at n. 10.

Petitioner's assertion of nationwide power under 205(e) is, however, untenable. In 1935, all agreed that Congress lacked power under the Commerce Clause to regulate wholly intra-state malt beverage transactions.⁶ Since 80% of the malt beverage industry operated in a purely intra-state manner in 1935, the Senate version of the Federal Alcohol Administration Act completely omitted the industry from coverage. See S. Rep. No. 1215; 74th Cong., 1st Sess. (1935). See also Cong. Rec., vol 79, No. 168, pp. 13395-13419. The House version, on the other hand, purported to place the 20% of the industry engaged in interstate transactions under federal regulation, despite arguments by the Senate that interstate brewers would be at an unfair disadvantage when competing against unregulated intra-state brewers. See H.R. Rep. No. 1542, 74th Cong., 1st Sess. (1935); See also Cong. Rec., vol. 79, No. 151, pp 12259-12272.

The 205(f) proviso was inserted by the Conference Committee as a compromise between the House and Senate versions. It was designed to eliminate the possibility of unfair competition between inter-state and intra-state brewers by limiting the geographical reach of federal regulation of interstate brewers to those states where "similar" regulations governing intra-state brewers were in effect. See Conference Report and Statement of Managers to the House, House Report No. 1898 (Cong. Rec., vol 79, No. 176, pp. 14672-14676; 14806-14810; *id* at pp. 14948-14953 (Senate agreement). See also Cong Rec., vol. 79 pp. 14475 (Aug. 24, 1935) (Senate) and Cong Rec., vol. 79 p. 14565-68 (Aug. 24, 1935) (House).⁷ Thus, pursuant to the compromise, if a state remains silent with respect to intra-state brewers, or if it enacts intra-state regulations that differ from the federal norms governing

⁶ See *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁷ The genesis of the proviso may be found in the hearings before the Senate Committee on Finance, 74th Cong., 1st Sess, July 26, 27, and 29th, 1935, at pp 97; 113; 122; and 138.

interstate brewers, the federal legislation simply does not apply in that state.

Petitioner concedes that 30 states have either remained silent or have enacted some form of label regulation that differs significantly from the federal norm. Thus, at most, his statutory power under section 205(e)(2) applies in 20 states and the District of Columbia. Moreover, when one examines the laws of those jurisdictions, potential issues of parallelism exist in some of them, making it difficult to predict with precision where section 205(e) applies.⁸

At least three consequences flow from petitioner's longstanding but erroneous effort to enforce Sec. 205(e) on a nationwide basis. First, it makes a mockery of petitioner's claim of cooperative federalism. Genuine federalism is hardly advanced by the sustained imposition of unauthorized federal regulation on more than 30 states.

Second, recognition that petitioner's long-time reading of the geographical scope of 205(e) is untenable may cause the Executive branch to reconsider its tenuous commitment to a dubious regulatory scheme that actually applies in no more than 20 states.⁹

Finally, while *amici* believe that a case or controversy continues to exist empowering the Court to reach the significant First Amendment issues raised by petitioner's adoption of state-imposed ignorance as a regulatory policy, the Court may wish to re-assess the appropriateness of deciding an important

⁸ The United States identifies only 10 states that have explicitly adopted the federal standards. *Brief of Petitioner*, at 10-11 & n.8. The laws of the remaining 10 states and the District of Columbia remain to be parsed to determine whether the state regulation is sufficiently "similar" to trigger the federal law.

⁹ The commitment of the Executive branch to the speech ban imposed by 205(e) has not been unwavering. In fact, the United States initially agreed that 205(e) violates the First Amendment. Confronted with the fact that the ban is not nationwide, the United States may well choose to return to its initial position.

constitutional question in the context of a hopelessly flawed statutory position.¹⁰ If, however, the Court elects to reach the First Amendment issue posed by petitioner's ban, neither the state nor the federal bans can survive First Amendment analysis.¹¹

¹⁰ According to petitioner, 10 states have adopted the federal regulations. Thus, 205(e)(2) would appear to apply in at least 10 states, creating an ongoing case or controversy. Even in those 10 states, though, the effect of 205(e)(2) is essentially redundant, since the operative regulation in each is state law not federal law. Petitioner's effort to construct an additional federal prop for its censorship program is, thus, unavailing.

¹¹ The 21st Amendment adds nothing to petitioner's argument. As applied to the federal ban before the Court, the 21st Amendment provides no support for petitioner's effort to impose federal regulations on 30 states that have opted for different regulatory schemes. See *Capital Cities, Inc. v. Crisp*, 467 U.S. 691 (1984).

Nor can the 21st Amendment be read to grant states or the federal government power to deny consumers truthful information about a product they are about to buy. The Amendment enhances the states' commerce clause powers; it does not diminish substantive constitutional rights. See *Craig v. Boren*, 429 U.S. 190, 206 (1976) (21st Amendment does not erode Equal Protection guarantees); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (21st Amendment does not erode Due Process guarantees); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982) (21st Amendment does not erode Establishment Clause guarantees). *California v. LaRue*, 409 U.S. 109 (1972) is not to the contrary, since the conduct at issue in *LaRue* (nude dancing in bars) has been held to be subject to state regulation under the First Amendment without regard to the 21st Amendment. *Barnes v. Glen Theater, Inc.*, 501 U.S. 560 (1991).

II.

PETITIONER'S EFFORT TO DENY CONSUMERS ACCURATE INFORMATION ABOUT A PRODUCT THEY ARE ABOUT TO BUY VIOLATES THE FIRST AMENDMENT

A. Consumers Have an Absolute First Amendment Right to Uncensored Information About the Lawful Products They Are About to Buy.

The key to a generation of commercial free speech cases in this Court is respect for a consumer's absolute right to receive uncensored, accurate information about lawful consumer choices. Despite claims that the free flow of commercial information would cause substantial harm, ranging from the undermining of neighborhood pharmacies¹²; to interference with efforts to maintain integrated neighborhoods¹³; to erosion of the moral fiber of the young¹⁴, this Court has repeatedly recognized that a consumer-driven, free market economy cannot function efficiently in the absence of a free flow of uncensored, truthful commercial information. Just as a functioning political democracy requires the free flow of information needed to make informed political choices, a functioning market economy is dependent on informed choice by autonomous consumers for its efficient operation.

Thus, in the 18 years since the Court explicitly recognized in *Virginia Pharmacy* that commercial speech is entitled to First Amendment protection, it has repeatedly upheld the consumer's right to receive accurate, uncensored commercial information relevant to the making of a lawful economic choice. E.g. *Virginia State Board of Pharmacy v. Virginia Cit-*

¹² *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

¹³ *Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 85 (1977).

¹⁴ *Carey v. Population Services, Int'l.*, 431 U.S. 678 (1977).

izens Consumer Council, 425 U.S. 748, 763-65 (1976) (price information concerning prescription drugs); *Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 85, 96-97 (1977) (information on availability of real estate); *Carey v. Population Services, Int'l.*, 431 U.S. 678, 701 (1977) (information about birth control devices); *Bates v. State Bar of Arizona*, 433 U.S. 350, 374, 75 (1977) (information on price and availability of legal services); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 567-68 (1980) (information on availability of electrical services); *In re R.M.J.*, 455 U.S. 191 (1982) (information on availability of legal services); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 69 (1983) (commercial information in the mails about birth control); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 643, 646-47 (1985) (information on availability of legal services); *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988) (same); *Peel v. Attorney Registration and Disc. Comm'n*, 496 U.S. 91, 110 & n.18 (1990) (same); *Edenfield v. Fane*, 113 S.Ct. 1792 (1993) (face-to-face information about accountant's services); *Ibanez v. Florida Board of Accountancy*, 114 S.Ct. 2084 (1994) (accurate information concerning lawyers' qualifications).

In settings where commercial speech does not assist the consumer in making an informed, autonomous choice, this Court has declined to afford it First Amendment protection. For example, where a commercial speaker solicits a consumer to engage in unlawful commercial activity, the speech is not protected by the First Amendment because the consumer's choice is not a lawful one. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973) (sex-typed want ads not protected)¹⁵. Similarly, where commercial speech

¹⁵ Petitioner cites *United States v. Edge Broadcasting Co.*, 510 U.S. ____ (1993) as support for its speech ban. *Edge Broadcasting* is inapplicable for at least two reasons. First, the statute in *Edge Broadcasting* was a genuine attempt to respect conflicting state policies. As amici have demonstrated, however, petitioner's reading of 205(e) hardly qualifies as

is false or misleading, the speech may be forbidden because it actually impedes consumers in making the informed and autonomous choice on which a free market economy depends. *Friedman v. Rogers*, 440 U.S. 1 (1979) (ban on misleading trade names). Thus, whether one focuses on the many cases upholding commercial free speech claims, or on the handful of settings in which commercial free speech claims have been rejected, the Court's central concern has been the consumer's right to receive uncensored, accurate information in order to make an informed and autonomous choice.

The Court's pre-occupation with the consumer's right to know reflects a structural difference between commercial and non-commercial speech. In the non-commercial speech context, First Amendment doctrine is a function of two fundamental sets of interests: (1) the speaker's dignitary interest in individual self-expression¹⁶; and (2) the hearer's instrumental interest in receiving information.¹⁷ When the two values point in the same direction, as in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *New York Times Co. v. United States*, 403 U.S. 713 (1971), non-commercial First Amendment protection is at its apogee.

an effort to respect the policies of the 30 states that it overrides. Second, and more importantly, *Edge Broadcasting* is merely a complex application of the *Pittsburgh Press* principle. In *Edge Broadcasting*, the United States keyed the legality of broadcast advertisements for state lotteries to whether the activity was lawful in the state from which the speech was transmitted. Amici continue to believe that legality at the point of receipt is the constitutionally preferable standard. In any event, however, *Edge Broadcasting* says nothing about truthful speech concerning universally lawful economic choices.

¹⁶ The leading exponent of free expression as an inherent aspect of individual dignity is Tom Emerson. Emerson, *The System of Free Expression* (1970).

¹⁷ The leading exponent of free speech as an aid to informed decision-making is Alexander Meikeljohn. A. Meikeljohn, *Free Speech and Its Relationship to Self-Government* (1948).

When speaker and hearer interests are in tension, however, the Court has recognized that a political or aesthetic speaker's dignitary interest in self-expression supports a broad toleration principle that protects a speaker, even when the speech is of little or no apparent value to hearers. Thus, when speaker and hearer interests divide, our non-commercial First Amendment tradition has tended to favor the speaker's dignitary interest in individual self-expression, even when the speech is hateful, inaccurate and deeply offensive to hearers; at least in the absence of an extremely powerful hearer interest. Compare, e.g., *Cohen v. California*, 403 U.S. 15 (1971) ("Fuck the Draft" slogan on jacket protected despite offensiveness to onlookers); *Texas v. Johnson*, 491 U.S. 397 (1989) (burning American flag protected); *National Socialist Party v. Skokie*, 432 U.S. 43 (1977); and *Collin v. Smith*, 447 F.Supp. 676 (N.D. Ill.), aff'd, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978) (Nazi demonstration in Jewish suburb of Chicago protected) with *Frisby v. Schultz*, 487 U.S. 474 (1988) (right to be free from "focused picketing" at home); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (right not to be "captive audience"); and *Madsen v. Women's Health Center*, 114 S.Ct. 2516 (1994) (no right to be free from proselytization; right to be free from harassment and intimidation).

Unlike non-commercial speech about religion, politics or art, however, speech that "merely proposes a commercial transaction"¹⁸ has occasionally been treated by the Court as failing to implicate a significant speaker interest in self-expression. *Amici* believe that current doctrine underestimates the quality and intensity of the speaker's interest in commercial speech, especially in settings where a commercial speaker seeks to convey truthful information about a product of which the speaker is intensely proud. Much commercial speech reflects an intense personal pride in the quality and

¹⁸ The phrase is drawn from *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973).

value of the product that more than rivals the dignitary interest of many non-commercial speakers. Indeed, in settings where, as here, a commercial speaker wishes to disseminate truthful information of assistance to hearers in making an economic choice, the mutually-reinforcing interests of both speaker and hearer should combine to provide reciprocal protection for the processes for a free market.¹⁹

On the other hand, the Court has recognized that the hearer's interest in receiving truthful, non-deceptive speech about economic choices is, if anything, more intense than in many non-commercial settings. *Id.* at 763-64. See Neuborne, *The Pomerantz Lecture: First Amendment and Government Regulation of Capital Markets*, 55 Brooklyn L. Rev. 5, 31-32 (1989). Not surprisingly, lacking a uniformly strong recognition of a speaker/dignitary interest, but boasting an extremely powerful hearer interest, the commercial speech jurisprudence of the Court may fairly be characterized as "hearer-centered".²⁰

¹⁹ The Court has noted the difficulty of distinguishing between commercial and non-commercial speech precisely because commercial speakers often possess a significant interest in self-expression. Eg. *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557, 579 (1980) (Stevens, J., concurring); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983); *Id.* at 81 (Stevens, J. concurring); *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 481-82 (1989).

²⁰ The difference between a speaker-centered jurisprudence in non-commercial settings and a hearer-centered jurisprudence in commercial speech settings has occasionally been misconstrued as a value judgment about the relative unimportance of commercial speech. But see *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. ____ (1993) (rejecting attempt to censor commercial speech based on its alleged unimportance).

The assertion that commercial speech is less important than non-commercial speech is simply wrong, both at the level of society and the individual. From the standpoint of an individual hearer, it is often demonstrably more important to receive information about a product than to receive non-commercial information. Compare, e.g., *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748,

Where, as here, a commercial speaker seeks to disseminate accurate information of interest to consumers, *amici* believe that the jurisprudence of this Court should be neither speaker, nor hearer, centered. Rather, it should be "process-centered" in an effort to support the optimum working of a free market dependent upon willing speakers and informed hearers.

In the hearer-centered commercial speech world constructed by this Court, or the process-centered world urged by *amici*, where commercial information is truthful and of obvious assistance to a competent consumer in making an informed choice, *amici* believe that American consumers have an *absolute* right to receive uncensored information about the contents and the attributes of a lawful product they are about to buy. While absolutes are rare in the law, *amici* cannot imagine a government interest sufficiently weighty to counterbalance a consumer's right to be free from government-imposed ignorance about the attributes of a product she is about to buy. Cf. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

B. The Government's Assertion of an Interest in Maintaining Consumer Ignorance Fails to Qualify as a Legitimate State Interest Within the Meaning of *Central Hudson*.

Amici believe that no government interest, however compelling, can override a consumer's right to be free from government censorship of the truth. If, however, the state chooses to attempt to deny consumers accurate information about a product they are about to buy, it must, at a minimum, assert a governmental interest of the highest order. In *Central Hudson*,

763-64 (1976)(price advertising of prescription drugs) and *Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 86 (1977) (real estate information) with *Cohen v. California*, 403 U.S. 15 (1971) (scatological phrase on speaker's jacket); and *Texas v. Johnson*, 491 U.S. 397 (1989) (burning the American flag). Similarly, in the context of many commercial messages, the speaker's pride in his product may generate a more intense dig-
nitary need to speak than in many non-commercial settings.

this Court required the government interest in regulating commercial speech to be at least "substantial". In this case, however, the interest in censorship asserted by petitioner is not even legitimate.

Although couched in terms of strength wars and federalism, the real interest asserted by the United States is a lack of faith in the capacity of American consumers to cope with the truth.²¹ Such an interest in state-mandated ignorance does not even qualify as "legitimate", much less as "substantial".

In the mundane circumstances of the label on a bottle of beer, two contrasting visions of the individual collide in this case. On the one hand, respondent and *amici* view the average American consumer as competent to receive, assess and evaluate a wide variety of commercial information as the first step in making rational, autonomous decisions about consumer preferences. *Amici* believe that American consumers, immersed in a sea of information and persuasion, are fully capable of reasoned, autonomous choices about whether and what to purchase.

The 1935 ban on truthful information, on the other hand, treats American consumers as untrustworthy and vulnerable pawns, subject to manipulation by producers and prey to "socially undesirable" judgments about their best interests. The 1935 Act treats consumers as if they were drowning in an information sea, in need of government-mandated ignorance as a life preserver.

Amici believe that the First Amendment flatly rejects the 1935 Act's jaundiced view of the capacity of American con-

²¹ Petitioner asserts two government interests in support of his censorship program: respect for state policy judgments and fear of strength wars. *Amici* have demonstrated that petitioner's untenable reading of 205(e) does not respect the policy judgments of at least 30 states. More importantly, both interests are merely euphemisms for a mistrust of the consumer's ability to handle the truth about "socially undesirable" product attributes.

sumers to act rationally on the basis of truthful information. The very existence of freedom of speech is premised on an assumption that individuals are capable of dealing with the truth. Indeed, when, as here, government censorship is premised on a vote of no-confidence in the capacity of the average individual to deal wisely with truthful information, it erodes a necessary attribute of freedom.

Free political and economic systems cannot endure unless they are firmly grounded in respect for the capacity of the individual to evaluate information and to make reasoned, autonomous choices. If American consumers cannot be trusted to know how much alcohol is in the bottle of beer they are about to buy, how can the same individuals be trusted to make the political judgments necessary to govern a free nation? If we accept paternalistic arguments in favor of censoring truthful commercial information, we take an inevitable step towards a similar acceptance of paternalistic censorship in the political arena.

No case has ever upheld a flat ban on the dissemination of truthful information about a lawful product. The government's effort to cite *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986) in support of its position is unavailing.

In *Posadas*, this Court narrowly upheld a regulation banning certain advertising of casino gambling. The original version of the regulation in *Posadas* had flatly banned all communication in the Spanish language capable of reaching the attention of residents of Puerto Rico. *Id* at 332-33. As such, it was analogous to the information ban at issue in this case. The Superior Court of Puerto Rico struck down the original information ban as violative of the First Amendment. *Id* at 335-36. The regulation actually before this Court in *Posadas* (after modification by the Superior Court of Puerto Rico) permitted widespread dissemination of truthful information about casino gambling in the Spanish language press and the distribution of promotional material in Spanish.

Instead of the actual holding in *Posadas*, petitioner seeks to rely on *dicta* by then-Justice Rehnquist arguing that, in the context of commercial activities that may be banned under the police power, government may elect a "lesser" form of regulation consisting of censorship of truthful information about the activity.²² The *Posadas dicta* should be rejected as wrong on at least two counts. First, the notion that the "greater" power to ban an activity carries with it a "lesser" power to condition its exercise on a waiver of free speech rights has repeatedly been rejected by this Court; and, second, using information control as a covert form of behavior modification is not a "lesser" interference with constitutional values than the enactment of an overt ban on an activity.²³

The Chief Justice's argument in *Posadas* that the "greater" governmental power to prevent an activity "necessarily" authorizes the government to place whatever "lesser" conditions it wishes on its exercise, including the waiver of constitutional rights, has been rejected in every context in which it has been asserted. See generally, Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415 (1989); Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4 (1988). Indeed, this Court has repeatedly recognized that one of the most important functions of a constitution is to constrain the government in the

²² The precise language used by then-Justice Rehnquist was:

"... the greater power to ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling" 478 U.S. at 345-46.

²³ Academic commentary has been extremely critical of Justice Rehnquist's *dicta* in *Posadas*. E.g. Kurland, *Posadas de Puerto Rico v. Tourism Company: 'Twas Strange, 'Twas Passing Strange, 'Twas Pitiful, 'Twas Wondrous Pitiful*, 1986 Sup. Ct. Rev. 1 (1986); McGowan, *A Critical Analysis of Commercial Speech*, 78 Calif. L. Rev. 359 (1990); Lively, *The Supreme Court and Commercial Speech: New Words With an Old Message*, 72 Minn. L. Rev. 289 (1987); Rotunda, *Symposium: "To Endure for Ages to Come": A Bicentennial View of the Constitution*, 65 N.Car. L. Rev. 917 (1987).

exercise of its discretionary power. Thus, when Justice Rehnquist argued that merely because the government could decide whether or not to create certain categories of employment, an employee must "take the bitter with the sweet" and accept a job conditioned on a waiver of procedural due process rights, this Court firmly rejected his position. Compare, *Arnett v. Kennedy*, 416 U.S. 134 (1974) (opinion of Justices Rehnquist, Stewart and Chief Justice Burger) with *Id* at 167 (opinion of Justices Powell and Blackmun); *Id* at 185 (opinion of Justice White); *Id* at 211 (opinion of Justices Marshall, Brennan and Douglas). Indeed, the Chief Justice's "bitter with the sweet" approach was explicitly rejected by eight members of the Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

Similarly, when the Chief Justice argued that since the government was under no duty to fund non-commercial television, it could condition funding on a waiver of the ability to broadcast privately funded editorials, the Court explicitly rejected his position, holding that the "greater" power did not include the "lesser" power to censor. *F.C.C. v. League of Women Voters*, 468 U.S. 221 (1984).²⁴

The current Court should similarly reject the dictum in *Posadas*.

In defense of his dictum, the Chief Justice argued in *Posadas* that censoring commercial speech about an activity is a less drastic government response than an outright ban. But such an argument misconstrues a fundamental postulate of a free society—the integrity of autonomous, individual choice. A free society can tolerate regulation of behavior; a truly free society cannot tolerate regulation of truthful speech as a covert means of behavior modification.

²⁴ *Rust v. Sullivan*, 112 S.Ct. 1759 (1989), even if correctly decided, is not to the contrary, since it dealt with the government's right to decide how its own resources were to be expended. This case attempts to dictate the speech of private actors using their own resources.

While regulation of behavior interferes with autonomous choice, the interference occurs openly, and only after a full political debate. Regulation of speech about a lawful choice is, however, a far more "drastic" event, since it attacks autonomous choice in a covert manner. It leaves citizens with the illusion of freedom, but the reality of government manipulation.

Our system will doubtless survive the foolish censorship of beer labels. But the constitutional precedent established by such paternalistic censorship cannot be confined to a bottle of beer. Freedom of speech is fragile. It is only as strong as its weakest principled link. If this case validates a principle that recognizes paternalism as an excuse for state-mandated ignorance, we will soon be censoring more than beer labels.

C. The Government Has Not Demonstrated a Sufficient Risk of Harm Caused by the Truthful Speech At Issue.

The only "harm" that the government claims may be caused by truthful speech in this case is the specter of brewers seeking to attract customers on the basis of higher alcohol content. The government's "strength war" bogeyman is really an assertion that consumers cannot be trusted with the truth. As such, it is not a legitimate government interest.

Even if, however, one assumes that preventing so-called strength wars qualifies as a substantial government interest, the United States has failed to demonstrate the requisite causal nexus between the truthful speech in question and the feared harm. At most, the government asserts that truthful speech on labels about alcohol content may have a "bad tendency" to lead to strength wars.

Prior to the pathbreaking free speech opinions of Justices Holmes and Brandeis²⁵, the state was free to censor speech

²⁵ *Schenck v. United States*, 249 U.S. 47 (1919); *Abrams v. United States*, 250 U.S. 616, 627 (1919) (Holmes and Brandeis dissenting); *United States ex rel Milwaukee Soc. Democrat Publishing Co., v.*

whenever the majority had a "reasonable belief" that speech had a "bad tendency" to lead to undesirable behavior. E.g. *Abrams v. United States*, 250 U.S. 616 (1919) *Gitlow v. New York*, 268 U.S. 652 (1925). Justices Holmes and Brandeis recognized that the "bad tendency" standard provided no protection to controversial speech. The essence of modern free speech protection is, therefore, a rejection of the bad tendency/reasonable belief test in favor of heightened judicial scrutiny of a censor's claim that speech should be banned because it creates a risk of harm.

In non-commercial speech contexts, the bad tendency/rational basis test has been supplanted by the rigorous "clear and present danger" test, requiring an almost certain causal nexus between speech and the harm it is alleged to cause. *Brandenburg v. Ohio*, 395 U.S. 444 (1969). When, as here, commercial speech is at issue, the heightened causation standard is reflected by the requirement that a would-be censor demonstrate that censorship is necessary to "directly" and "materially" advance the asserted government interest. *Ibanez v. Florida Board of Accountancy*, 114 S.Ct. 2084 (1994); *Edenfield v. Fane*, 113 S.Ct. 1792 (1993); *Central Hudson Gas & Electric Corp. v. Pub. Svc. Comm'n*, 447 U.S. 557 (1980).

The government's unsuccessful effort below to demonstrate a powerful causal link between truthful speech about alcohol content and so-called strength wars consisted largely of: (1) claims that strength wars occurred prior to the passage of the 1935 Act; (2) allegations that contemporary brewers are engaging in strength wars; and (3) claims that strength wars occur in unregulated jurisdictions. In fact, however, each aspect of the government's effort to prove that truthful speech will lead to strength wars is badly flawed.

Burleson, 255 U.S. 407, 436-38 (1920) (Holmes, J. dissenting); *Gilbert v. Minnesota*, 254 U.S. 325, 337 (1920) (Brandeis, J. dissenting); *Pierce v. United States*, 252 U.S. 239, 272-73 (1920) (Holmes and Brandeis, dissenting); *Schuyler v. United States*, 251 U.S. 466, 482 (1920) (Holmes and Brandeis, JJ. dissenting); *Whitney v. California*, 274 U.S. 357, 372-78 (1927) (Brandeis and Holmes, concurring).

The government's claim that brewers engaged in strength wars during the relatively short period between the repeal of Prohibition and the enactment of 205(e) in 1935 is flawed on two levels. First, what happened sixty years ago during the chaotic period following the repeal of Prohibition and the invalidation of the National Recovery Act is hardly predictive of contemporary behavior. More importantly, the government's claim that the 1935 Act was triggered in part by concerns that brewers were actually increasing the quantity of alcohol in their product is not borne out by the legislative record. Rather, when one examines the testimony cited by the government, the concern in 1935 was over false and misleading claims about increased alcohol content; not an actual increase in alcohol content.²⁶ While *amici* have no quarrel with a ban on false or misleading statements of alcohol content, the government cannot parlay a 1935 concern about accuracy into proof that truth will lead to strength wars in 1994.

Nor is the government's case stronger when one considers the contemporary behavior of the malt beverage industry. The

²⁶ A reading of the 1935 testimony cited by petitioner makes clear that concern with statements about alcohol content was largely driven by false and misleading assertions; not by actual strength wars. For example, the testimony of George McCabe quoted by petitioner at p. 8 of the *Brief for Petitioner*, states:

Some brewers went haywire . . . and were trying to sell their beer on an alcohol basis, and they resorted . . . to the use of all sorts of numbers . . . to convey the impression that the beer contained an excessive amount of alcohol, which it did not contain. (emphasis added).

Similarly, the House Report cited by petitioner at p. 9 of its brief (H.R. Rep. 1542, pp.12-13) made clear that the statements about alcohol content that troubled the Committee were false and misleading. For example, the Committee Report argued that "irrespective of th[e] falsity" of such statements, they threatened "fair competition". It was the Committee's fear of "unscrupulous advertising" and "deceptive labeling practices" that drove the ban. See also, H.R. Rep. 1542, p. 144.

United States presented virtually no evidence of competition on the basis of alcohol content in those jurisdictions that require or allow truthful reporting of alcohol content of malt beverages.

Finally, the government's claim that truth will inevitably lead to strength wars completely ignores the experience of the distilled spirits industry, which has not experienced strength wars despite a federal requirement that alcohol content be truthfully disclosed; and the wine industry, which has not experienced strength wars despite a combination of authorization and obligation to disclose alcohol content.²⁷

It is possible that the government's case is so weak that it would even fail the bad tendency/rational basis test. In any event, it cannot satisfy any variant of heightened causation associated with any level of First Amendment review. In apparent recognition of that fact, the government seeks to demote the truthful speech in question to a level of rational basis/ bad tendency scrutiny, by arguing that certain "socially undesirable" commercial speech is entitled to diminished protection and by arguing that the 21st Amendment erodes traditional First Amendment protections.

Such a ploy is merely an indirect way of arguing that the disfavored speech is entitled to no First Amendment protection at all. As Justices Holmes and Brandeis understood, demoting the protection afforded speech to the level of rational basis/bad tendency virtually eliminates any practical distinction between regulating speech and regulating behavior. Rational basis is simply not the test in a modern First Amendment case. *Discovery Network*, 113 S.Ct. 1510, n.13.

Adoption of a rational basis/bad tendency standard in commercial free speech cases to review the assertion of a causal nexus between speech and harm would drain the term

²⁷ Federal law permits accurate disclosure of the alcohol content of wines up to 14%, and compels disclosure above that point. See Sec. 205 (e).

"directly advance" of any meaning. Not surprisingly, this Court has repeatedly rejected similar efforts to censor on the basis of a "rational" fear that truthful commercial speech might cause substantial harm. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), for example, the Court acknowledged that it was rational to fear that price advertising for prescription drugs might erode the economic stability and professional standards of local pharmacists. Nevertheless, the Court ruled that proof of a more persuasive causal link between speech and improper behavior was required before truthful commercial speech could be censored. In *Linmark Associates, Inc. v. Willingboro Tp.*, 431 U.S. 85 (1977), Justice Marshall acknowledged that it was rational to fear that the uncontrolled display of "for sale" signs in racially troubled neighborhoods might exacerbate white flight and blockbusting. Nevertheless, the Court demanded a more persuasive demonstration of the causal link between outdoor signs and improper behavior before condoning censorship of outdoor signs. In *Carey v. Population Services, Int'l.*, 431 U.S. 678 (1977), the Court acknowledged that it was rational to fear that the uncontrolled advertisement and sale of contraceptives might induce some hearers (especially adolescents) to engage in socially undesirable sexual behavior. Nevertheless, the Court demanded a more exacting causal link between commercial speech and improper behavior before tolerating censorship of contraceptive advertising aimed at adults. In *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), the Court acknowledged that it was rational to fear that promotion of electric heat might lead to an unfair utility price structure because increased demand for electricity was not priced at marginal cost. Nevertheless, Justice Powell, writing for the Court in *Central Hudson*, coined the phrase "directly advances" to explain why New York's speculative link between commercial speech and harm was insufficient to justify censorship. Most recently, in *Edenfield v. Fane*, 113 S.Ct. 1792 (1993), the Court acknowledged that it was rational for Florida to fear

that face-to-face solicitation of new business by accountants might lead to deceptive advertising and invasions of privacy and might undermine the independence of CPA's. Nevertheless, Justice Kennedy, writing for eight members of the Court in *Edenfield*, ruled that Florida had failed to demonstrate the requisite causal link between the targeted speech and the feared evil. In words particularly applicable to this case, Justice Kennedy noted:

This burden [proving that censorship will "directly advance" a governmental interest] is not satisfied by mere speculation or conjecture; rather a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. [citations omitted]. Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression. 113 S.Ct. at 1800.

D. The Scope of the Censorship Program Is Far Broader Than Necessary.

Justice Holmes' second great contribution to free speech theory was his recognition that censorship may not be permitted to sweep more broadly than reasonably necessary to advance the precise government interest at stake. In the commercial speech context, Justice Holmes' concern over unnecessarily broad censorship is captured by the requirement that censorship be "narrowly tailored" to advance the government's asserted interest. *Peel v. Att'y Registration & Disc. Comm'n*, 496 U.S. 91 (1990); *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). While the requirement of "narrow tailoring" in a commercial speech context does not require mechanical invalidation of a regulation merely because other alternatives may exist, *Board of Trustees v. Fox*, 492 U.S. 469 (1989), it does require a care-

ful effort to avoid unnecessary censorship. *Peel v. Att'y Registration & Disc. Comm'n*, 496 U.S. 91 (1990). Such a careful effort is conspicuously missing from the government's scheme.

CONCLUSION

For the above stated reasons, the decision of the United States Court of Appeals for the 10th Circuit should be affirmed.

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New York, New York

Respectfully submitted,

Burt Neuborne
40 Washington Square South
New York, New York 10012
(212) 998-6172

Attorney for Amici Curiae
(Counsel of Record)

Gilbert H. Weil
60 East 42nd Street
New York, New York 10165

Attorney for A.N.A.

Henry L. Bauman
Valerie Schulte
National Association of
Broadcasters
1771 N. St., N.W.
Washington, D.C. 20036

Attorneys for N.A.B.

John F. Kamp
American Association of
Advertising Agencies
1899 L. Street, N.W.
Washington, D.C. 20036

Attorney for A.A.A.A.

Jeffrey Perlman
1101 Vermont Ave., N.W.
Suite 500
Washington, D.C. 20005

Attorney for AAF

No. 93-1631

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

LLOYD BENTSEN, SECRETARY OF THE
TREASURY, *et al.*,

Petitioners,

v.

COORS BREWING COMPANY,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Tenth Circuit

**BRIEF AMICUS CURIAE OF
THE WASHINGTON LEGAL FOUNDATION
IN SUPPORT OF THE RESPONDENT**

DANIEL J. POPEO
RICHARD A. SAMP
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 588-0302

CHARLES FRIED
(Counsel of Record)
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4636

DONALD B. AYER
JAMES E. ANKLAM
JONES, DAY, REAVIS
& POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

Counsel for Amicus Curiae

September 16, 1994

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1631

LLOYD BENTSEN, SECRETARY OF THE
TREASURY, *et al.*,

Petitioners,

v.

COORS BREWING COMPANY,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Tenth Circuit

BRIEF AMICUS CURIAE OF
THE WASHINGTON LEGAL FOUNDATION
IN SUPPORT OF THE RESPONDENT

INTEREST OF THE AMICUS CURIAE*

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center with more than 100,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to promoting commercial free speech rights. To that end, WLF has appeared

* The letters of consent to the filing of this brief from counsel for the parties have been filed with the Clerk of this Court.

before this Court in cases dealing with free speech issues, including *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1550 (1993); *Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91 (1990); *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Calif.*, 475 U.S. 1 (1986); and *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530 (1980).

SUMMARY OF ARGUMENT

This Court has recognized virtually plenary power in government to regulate conduct in an evenhanded way, where no fundamental right is implicated. At the same time it has put largely beyond the reach of government any measure to coerce—by mandate or prohibition—the minds, and thus the speech that reaches the minds, of adult persons. Speech may persuade, and persuasion may lead to conduct, but unless the speech portends an imminent danger of great harm the government may not for that reason stop the speaker's mouth or the listener's ears. *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969). Indeed, in a democracy it is only the second principle that makes the first tolerable. Commercial speech stands at the intersection of these two currents of decision: Promotional advertising, direct solicitation, and contractual offers are speech which is part of the conduct of business. The character of First Amendment protection afforded such speech reflects both the governmental authority to regulate the underlying business activity, and the Amendment's protection of the free flow of information.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 769 (1976), the Court made clear that speech directed at conduct in the marketplace was not for that reason beyond the substantial protection of the First Amendment. The reason was clear: "[The] consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763. Accord, *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1550, 1512 n.17 (1993).

To the extent, however, that regulation of commercial speech partook of regulation of the commerce itself, the Court has recognized that government may sometimes limit speech that proposes transactions that are harmful and thus might be seen as aspects of those transactions themselves. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 569-71 (1980) (recognizing principle but rejecting certain limitations on promotion of electricity as a fuel source). Similarly, commercial speech occurs in contexts where the law has traditionally protected against fraud, misrepresentation and oppression. Accordingly, since the criteria of truth and accuracy are more readily available in commercial than in, say, political contexts, the Court has permitted government considerable latitude in assuring that commercial communications neither lie, mislead, nor trick their audience by less than full and accurate statements. *Ibanez v. Florida Dep't of Business & Prof. Reg.*, 114 S. Ct. 2084, 2088 (1994) ("Because disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information, only false, deceptive, or misleading commercial speech may be banned.") (internal quotations and citation omitted).

Thus, the Court has recognized a limited power to restrict the forms of commercial speech relating to even wholly legal activities—to assure that it is not misleading or coercive, or even to render its commercial proposal less persuasive. But what the Court has never allowed, since first recognizing that commercial speech is after all speech and therefore protected by the First Amendment, is suppression of accurate, factual information on the ground that its dissemination will allegedly impair the achievement of governmental objectives. On the contrary, the Court has firmly adopted in the commercial context the more general First Amendment principle that government ends may not be advanced by the simple expedient of keeping people ignorant of basic factual information. *Virginia Board of Pharmacy*, 425 U.S. at 769. See *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 95-96 (1977) (city may not pursue laudable policy of

discouraging "white flight" by keeping its citizens in ignorance about when residential property is for sale or has been sold).

The four-part *Central Hudson* test states the balance the Court has struck between the interest in the free flow of commercial information and the government's interest to assure that such information relates to lawful subjects in a truthful and non-misleading way. Where, as in this case, the admitted purpose of the regulation is to keep consumers ignorant of pertinent factual information factually presented, *amicus* contends that there is no occasion to apply the *Central Hudson* analysis. Rather the more fundamental First Amendment analysis applies: When government seeks to silence statements on a lawful subject, statements that are neither false nor even misleading, because government believes that the public had better not know this information, then it must act for a compelling reason and its means must be strictly tailored to that exigent end. *E.g.*, *New York Times Co. v. United States*, 403 U.S. 713, 730-40 (1971) (White, J., concurring) (government failed to demonstrate authority for prior restraint notwithstanding laws punishing publication of classified secrets); *United States v. The Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis.) (granting order restraining publication of article describing how to manufacture a hydrogen bomb), *dism'd without opinion*, 610 F.2d 819 (7th Cir. 1979).

Amicus argues first that the regulation in this case does not even come close to meeting this stringent test. (Section I). *Amicus* argues next (Section II) against the United States' two assertions of an entitlement to deferential review of the provision in issue. Neither this Court's decision in *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), nor the argument that the United States is acting to facilitate state regulation of alcohol under the Twenty-first Amendment to the Constitution supports the conclusion that the Federal Alcohol Administration Act's ban on all label information as to alcohol content gets special deference because of the nature of product involved. Finally, *amicus* will also show (Section III), that for the same reason that this regulation fails the basic First Amendment test, it also fails the more permissive test proposed

by *Central Hudson*. As the Tenth Circuit properly held, the regulation does not "directly advance" a legitimate governmental interest. The concept of directness, if it is to have any determinate meaning, must take into account the unusual route the government seeks to travel here to achieve its goal. Nor, for analogous reasons, is there the appropriate degree of fit between the regulation and that goal. Indeed, the government's defense of the regulation comes close to admitting as much, since the government shows no more than a rational relation of the regulation to a legitimate interest—the most permissive test for governmental action, and one which is quite inappropriate to test prohibitions on the transmittal of information, even in a commercial context.

ARGUMENT

At issue in this case is whether Respondent Coors Brewing Company ("Coors") may include on the labels of its malt beverage products sold throughout the United States a simple, accurate statement of the alcohol content of the beverage. The Court of Appeals for Tenth Circuit concluded that the Federal Alcohol Administration Act ("FAAA") ban on "statements of . . . alcoholic content of malt beverages," 27 U.S.C. § 205(e)(2) (1988), applicable in those States where no law requires the listing of alcohol content information on product labels,¹ violates the First Amendment because it fails to satisfy the third prong of the test enunciated in *Central Hudson*, requiring that the restriction directly advance the governmental interest being promoted. Pet. App. at 7a-8a. *Amicus* agrees with this conclusion, but show first that the same result can also be reached by a more direct route.

The commercial speech at issue in this case provides only accurate and specific information about the contents of a beverage container. Moreover, Coors does not challenge here the federal

¹ This information currently appears on Coors's products marketed in those States that require labeling to include a designation of alcohol content. Ten States require alcohol content information on certain types of malt beverage products. Pet. Br. at 11, n.10.

ban on using alcohol content information in promotional advertising.² Pet. App. at 4a-5a. The only rationale for the government's position is that, as the government has articulated, Pet. Br. at 35, the labeling restriction would "generally prevent consumers from knowing with certainty even that malt liquors, as a category, have higher alcohol content than other types of malt beverages," and would "prevent consumers from choosing among brands of *any* type of malt beverage . . . on the basis of their high alcohol content." In short, the government contends it will be better for people not to know the alcoholic content of the product they are contemplating buying or consuming. But "[i]t is precisely this kind of choice between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Virginia Board of Pharmacy*, 425 U.S. at 770.

I. THE FEDERAL EXCLUSION FROM MALT BEVERAGE LABELS OF ANY INFORMATION AS TO THE ALCOHOLIC CONTENT OF THE PRODUCT VIOLATES THE CARDINAL PRINCIPLE THAT GOVERNMENT SPEECH RESTRICTIONS MAY NOT BE JUSTIFIED ON THE GROUND THAT KEEPING PEOPLE IN IGNORANCE OF CERTAIN PURELY FACTUAL INFORMATION WILL HAVE BENEFICIAL EFFECTS.

The government in its brief asserts that there are two justifications for the labeling restriction at issue in this case—a desire to curb strength wars, and the facilitation of state regulation

² Of course there are difficulties in identifying what constitutes advertising and promotion in contrast to the straightforward furnishing of an unvarnished fact here. But this case does not present a need to address that difficulty because the government explicitly acknowledges that its chosen means of regulation is keeping consumers ignorant, not protecting them from misleading or overly insistent importuning. The regulation of advertising may involve considerations analogous to those *amici* in support of Petitioners raise here, but the government has attempted no such more nuanced regulation and so the issue is not presented.

of alcohol. Pet. Br. at 20-22. Whatever one's assessment of the substantiality of these interests, or of the degree to which the alcohol labeling prohibition directly advances them in a narrowly tailored manner, it is entirely clear that they are advanced, if at all, by a chain of reasoning under which perceived harmful consequences are to be avoided by denying people basic factual information. By denying actual and potential consumers knowledge of this particular product characteristic, it is postulated, consumers and producers will be prevented from acting in a socially harmful way so as to increase the consumption of high alcohol malt beverages. The statute and regulation in question deny consumers that information by prohibiting its inclusion on the product label in any form.

A more effective way of keeping people in the dark can hardly be imagined. The prospective purchaser of such products has no plausible means of ascertaining this information in any way. In *Virginia Board of Pharmacy*, the prospective buyer of prescription drugs could ask the pharmacist his price, and thus price shop by a cumbersome word-of-mouth approach. In *Linmark Associates*, the seller of a house, denied his yard sign, could still advertise in the newspaper. But here, the purchaser of malt beverages has neither newspaper advertising nor the probability of an informed sales clerk to turn to, and the overall regulatory scheme seems well calculated to chill the speech of any knowledgeable promoter of the product who might be asked about its alcohol content.

"[I]n recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." *Central Hudson*, 447 U.S. at 566 n.9. Manifestly, the sale and consumption of malt beverages is not an unlawful activity. The federal government does not contend that the information about the alcohol content of malt beverages that

Coors seeks to include in its product labels is deceptive.³ Pet. Br. at 20 n.16. Likewise, there is no issue here concerning governmental authority to restrict the form or medium by which a product is advertised or promoted. Coors does not challenge 27 C.F.R. § 7.29(f)(1993) (forbidding the use of the words "strong," "full strength," "extra strength," or similar words on labels) or 27 C.F.R. § 7.29(g) (forbidding the use of designs or devices "likely to be considered as statements of alcoholic content."). Coors dropped its challenge to the constitutionality of 27 U.S.C. § 205(f)(2), the federal ban on advertising the alcohol content of malt beverages, before the trial court ruled, and did not pursue the issue on appeal. See Pet. App. at 5a; Pet. App. at 34a-35a. Thus Coors is not now claiming to be able affirmatively to advertise or characterize the alcohol content in any particular way.

The fact that a government ban on access to factual information relates to a commercial product in no way ameliorates the harmful consequences of such suppression. Consumers have a variety of interests in obtaining information about the alcohol content of malt beverages. Some have health conditions that allow the consumption of alcohol in moderate amounts, for which

³ *Amicus* Center for Science in the Public Interest argues that alcohol content labeling involves "inherently misleading half-truths" because it "would deceptively make beer appear to be less intoxicating than wine and liquor when in fact beer is not" because an average serving is larger. CSPI Br. at 5. This remarkable argument, which does not appear in any way to contest the factual accuracy of a label's statement that the beverage contains a certain percentage of alcohol by volume, is simply another version of the unsound paternalistic notion that too much accurate information may be bad for people. In this case, the essential premise for that conclusion is that people will fail to realize that total alcohol consumed, and the intoxicating effect experienced, is a function not of the alcohol percentage alone, but of that together with the quantity consumed. In sum, *amicus* WLF responds to this argument with a question: how many people old enough to buy beer or wine do not know that there is a lot more liquid in a stein of beer than in a wine glass full of wine?

knowledge of the alcohol content of specific product is necessary. Individuals on diets may need to know the alcohol content to monitor their intake of calories. Some consumers dislike the taste of higher alcohol content malt beverages. For all of the above and similar consumers, statements of alcohol content provide necessary information akin to the labels found on most packaged food products that summarize the constituent elements of the product.

Amicus submits that the facts of this case present a stronger argument for treatment under a rule against pursuit of government goals by suppression of information than many of those in which the Court has most emphatically enunciated that principle. In *Virginia Board of Pharmacy*, the Court struck down a State statute making it unprofessional conduct for a pharmacist to advertise prescription drug prices. The State agency attempted to justify the restriction on the ground that it was necessary in order to prevent price cutting which might lower the professional quality of the pharmaceutical profession in the State. Notwithstanding the State's broad and unquestioned power to license and regulate professionals, see *Friedman v. Rogers*, 440 U.S. 1 (1979), *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955), the Court found the ban inconsistent with the core notion that government may not act to advance its interests, however substantial they may be, by relying on claimed beneficial effects of keeping people ignorant of basic facts.

In *Linmark Associates, Inc. v. Willingboro*, the Court struck down a town ordinance prohibiting real estate "For Sale" signs, which was enacted for the purpose of stemming white flight. Notwithstanding local government's recognized authority to regulate the time, place and manner of signs on private property, or the importance which the Court conceded to the goal of promoting stable and racially integrated housing, 431 U.S. at 94-95, the Court rejected the ban on the ground that the suppression of "the free flow of truthful information," because of its anticipated effects on the conduct of those learning of it, is constitutionally impermissible.

The present ban on labeling information concerning alcohol content, unlike the restrictions at issue in *Virginia Board of Pharmacy* and *Linmark Associates*, does not relate to advertising or solicitation, whose form and content the Court has sometimes allowed States to restrict. Instead, it is a complete prohibition of the package's alcoholic contents being included on the product label itself. As such, the FAAA's labeling restriction, quite unlike the advertising restrictions struck down in *Virginia Board of Pharmacy* and *Linmark Associates*, is an effort to foreclose all dissemination of the information at issue and to keep consumers ignorant. (It is as if Virginia had forbidden the pharmacist from quoting a price even at the time of the sale, so that the customer would only know what he had paid when he received his monthly bill or been handed his change after the transaction was completed.)

A disposition in this case based on the cardinal principle that government may not pursue its policy objectives by measures whose core purpose is to keep people unaware of certain relevant facts is wholly consistent with this Court's prior cases. Such a conclusion poses no hidden peril for federal or State regulatory schemes where the government restrictions on expression rest on a rationale more subtle than the simple proposition that it is better for people not to know certain things. Where speech relating to commercial products goes beyond a concededly accurate factual label statement of the package's contents, to embody advertising or promotional activities, issues other than the simple suppression of factual information become relevant, and the analysis, utilizing the four-part test of *Central Hudson*, necessarily becomes more complex.

Likewise, even with regard to labeling, government regulation of the form in which information is presented—in the cases of food labeling, 21 U.S.C. § 343 (1988 & Supp. V 1993),⁴ drug

⁴ Food labels generally must contain five items: (1) common or usual name and statement of identity, 21 U.S.C. § 343(g), 21 C.F.R. § 101.3(b) (1994); (2) quantity of contents, 21 U.S.C. § 343(e)(2), 21

labeling, 21 U.S.C. § 352 (1988 & Supp. V 1993),⁵ and cosmetics labeling, 21 U.S.C. § 362(b) (Supp. V 1993),⁶ for example—is based on concerns of clarity and consistency that justify imposing requirements as to the form or content of expression.⁷ These sometimes detailed requirements are justified by a purpose to present consumers and others with information in

C.F.R. § 101.105(a); (3) name and place of business of manufacturer, packer or distributor, 21 U.S.C. § 343(e)(1), 21 C.F.R. § 101.5(a); (4) ingredient information, 21 U.S.C. § 343(i) & (k), 21 C.F.R. § 101.22; and (5) nutritional information, 21 U.S.C. § 343(q), 58 Fed. Reg. 2079 (Jan. 6, 1993) (adopting new nutritional label standards that specify the format for the information). If the labels fail to meet these standards, the FDA can take regulatory action against the product as misbranded under 21 U.S.C. § 343(a).

⁵ Pursuant to 21 C.F.R. § 201.56(d)(1), the FDA specified eleven categories of information that must appear on prescription drug labels (to the extent each category is relevant to the drug). Specific labels for prescription drugs are determined by negotiations between the sponsor of the drug and the FDA after the FDA has approved the drug. 21 C.F.R. § 314.110(a). Labeling of drugs sold over the counter is regulated by a separate standard arising from the FDA's procedures for a formal review of "active ingredients" found in over the counter drugs. 21 C.F.R. § 330.1. In addition to content information, the labeling requirements include, for many drugs, required package inserts providing additional information and warnings. *E.g.*, 21 C.F.R. § 310.501 (oral contraceptives).

⁶ The standards for labeling of cosmetics appear in 21 C.F.R. pt. 701.

⁷ *Amicus* Center for Science in the Public Interest analogizes the regulation here to food labeling regulations that prohibit certain statements about calories per serving on the front label. Br. of CSPI at 19. Yet any such ban is acceptable only because the government requires that the nutritional information about calories appear on the back label in a specific format. 21 C.F.R. § 101.9(d)(5) & (12). In the case of food regulation, the government does not wholly suppress the information as it does in the case of alcohol content of malt beverages, but rather regulates the form and manner in which the information is conveyed.

an understandable form, to avoid confusion, and to prevent information deemed particularly pertinent from being overwhelmed by less urgent communications. Thus the thrust is always towards allowing better informed decisions. By contrast cases like this, involving an avowed and straightforward effort to deny people factual knowledge, have been rare. But that fact should not cause the Court to decide this case by a balance appropriate only where the government seeks to assure that speech on a lawful commercial subject is true and not in any way misleading. In this rare case, where the government seeks to justify a regulation of speech as necessary to prevent a general awareness of accurate, relevant factual information, the government must meet a far more stringent test: The end it pursues must be compelling, and this unusual and offensive means had better be narrowly tailored to serve it.

II. GOVERNMENT SUPPRESSION OF BASIC FACTUAL INFORMATION TO AVOID PERCEIVED CONSEQUENCES OF SUCH KNOWLEDGE CANNOT BE JUSTIFIED UNDER SOME PRESUMPTION OF VALIDITY INCIDENT TO GOVERNMENT REGULATION OF ALCOHOL OR OTHER "SOCIALLY HARMFUL" ACTIVITIES.

The government asks this Court to engraft on the law of commercial speech an exception for an ill-defined category of instances in which virtually entire deference is owed to government regulation of speech concerning alcohol or other "socially harmful" activities. Such a presumption would be directly at odds with the cardinal rule under the First Amendment that government may not generally advance its goals by banning communication of relevant, accurate factual information.

A. The government argues, Pet. Br. at 38, that this Court's decision in *Posadas de Puerto Rico*, gives rise "to 'an added presumption' of validity" because legislatures have a broader latitude to regulate speech that promotes socially harmful activities than they have to regulate other types of speech. This contention should be rejected as but one more effort to let the government's

outright suppression of basic factual information skate by through application of a deferential, "rational basis" standard.

Any notion of deference with regard to regulating the advertisement or promotion of particular activities which have been identified as socially harmful is inapplicable with regard to the kind of non-promotional information involved here. Nor does *Posadas*—which dealt with advertising efforts directed to Puerto Rico residents—amount to a total ban on dissemination of information concerning casino gambling establishments located there. Unlike the ban in this case, which all but forecloses consumer receipt of basic information concerning a legal product, the restriction in *Posadas* left numerous ways for residents to become aware of the on-going gambling activities. 478 U.S. at 335-36, 343 (quoting the Puerto Rico court's narrowing construction of law, which notes that the statute does not ban casino advertising directed at tourists that may nonetheless incidentally reach Puerto Rico residents).

More fundamentally, the recognition the government seeks for a presumptive right to suppress basic factual information with regard to "socially harmful" activities would create a gaping hole in the protections afforded by the First Amendment. Such a category would be inherently formless. In its brief, the government points to four areas of "socially harmful" activity: cigarettes, alcohol, brothels, and gambling and lotteries. Pet. Br. at 39. It offers no test to define the boundaries of such a category, apparently believing the subject matter at issue in this case, alcohol, falls easily within it.⁸ Such foggy thinking merely highlights the unworkability of any such rule.

⁸ In *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993), the government suggested this Court should abandon the *Central Hudson* test for commercial speech about activities normally considered to be "vices." The Court ignored the suggestion then, 113 S. Ct. at 2703, and should continue to reject the government's idea, now renamed "socially harmful" activities.

The government offers as the talisman for inclusion in the "socially harmful" category the recognition that the government could ban the activity, so that a lesser regulation of banning commercial speech about the activity is permitted. Pet. Br. at 38-41. See *Posadas*, 478 U.S. at 346 ("it is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising"). But on inspection this proves to be no test at all. Since the demise of *Lochner v. New York*, 198 U.S. 45 (1905), government has been free to regulate to the point of banning outright *any* activity not protected as a fundamental right: that may include smoking, the consumption of alcohol, but also the consumption of foods high in cholesterol, the keeping of pets and travel by private vehicle unless accompanied by two or more passengers, all of whom must wear seat belts. Now it is to the highest degree implausible to argue that because government is constitutionally entitled to ban all of these behaviors, it may also ban all speech, including factual and completely accurate non-promotional labeling, by those who sell goods and services related to them.

To be sure, this Court has always considered and judged for itself the urgency of an asserted governmental interest, as it does the balancing that various of its doctrines enjoin upon it. The *Central Hudson* test requires such balancing in the last three of its four prongs. But because liberty of expression is also in the balance in commercial speech cases, the Court must judge for itself the weight of the asserted government interest. To give preemptive weight to any government policy because it might constitutionally have justified outright prohibition of conduct would deprive this Court of just the exercise of judgment upon government restrictions that free speech doctrine assigns to it.

B. Equally unavailing is the government's argument that its regulation here is merely an effort by the federal government to assist State regulations and policies relating to alcoholic beverages. The government relies on this Court's decision in *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993),

as an instance of federal speech regulation aimed at accommodating State interests, and argues further that the Twenty-first Amendment entitles the FAAA to special deference. In both respects, the government's contentions should be rejected.

i. This case is far different from *United States v. Edge Broadcasting Co.* The field of broadcasting, the area at issue in *Edge Broadcasting*, is one where "the Congress has greater latitude to regulate . . . than other forms of communication." 113 S. Ct. at 2702. Further, the fit between the federal provision's allowance or prohibition of particular expression and the State policy being accommodated is much closer in *Edge* than in this case. The provisions at issue in *Edge Broadcasting* prohibited speech about lotteries except when the State had permitted the underlying activity. By comparison, the FAAA prevents dissemination of purely factual information even though the product may be legally bought and consumed in the particular State. Unlike the provisions challenged in *Edge Broadcasting*, the FAAA makes a federal choice in favor of no labelling unless a State chooses otherwise. The federal law does not represent deference to State decisions—it imposes a decision unless the State acts.

Thus, Congress's choice to ban lottery ads on stations that were located in anti-lottery States directly served the congressional policy of respecting the anti-lottery State's choice to forbid lotteries. 113 S. Ct. at 2704.⁹ And the regulations at issue in *Edge Broadcasting* did not prevent factual news reporting about the existence of lotteries in Virginia; they restricted only promotional advertising. 113 S. Ct. at 2702. The statutory provisions therefore did not promote ignorance of lotteries; rather

⁹ The fact that signals from stations in the pro-lottery State could still reach the citizens of the anti-lottery State did not make the fit between the federal policy and its regulations unreasonable. *Id.* at 2705 (analogizing to the reasonableness test for time, place, and manner restrictions on non-commercial First Amendment speech).

they simply forbade one form of promotional advertising likely to reach residents of anti-lottery States. 113 S. Ct. at 2707.

ii. With regard to the Twenty-first Amendment, to begin with, it seems one hundred and eighty degrees wrong to invoke that Amendment to increase federal power in the area of liquor commerce so as to justify regulation so burdensome that the regulation could not otherwise stand. The Twenty-first Amendment does no more than enhance *State* power over commerce in liquor; the federal government does not receive increased power from the Twenty-first Amendment.¹⁰

Moreover, the Amendment does not allow the State, by virtue of regulatory power over liquor commerce, to override other provisions in the Constitution that restrict State power. *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 344-46 (1964) (Twenty-first Amendment did not "permit what the Export-Import Clause precisely and expressly forbids."). If the Twenty-first Amendment has no effect on the Export-Import Clause, which concededly relates to power to tax commerce, it can hardly be surprising that the Amendment has no effect on other provisions of the Constitution, such as the First Amendment.

Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. . . . "Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected

¹⁰ In addition to States, section 2 of the Twenty-first Amendment also refers to territories and possessions. Yet this reference does not aid the government's defense of the FAAA because the Act's effects are not limited to federally-controlled territories or possessions. Nor does the Amendment increase federal power over liquor commerce in any sense, for Congress has always exercised plenary power over any form of commerce. At best the reference to territories and possessions should be read as a grant of similar protection to acts by the legislature of the territory or possession regulating liquor commerce.

by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned."

Craig v. Boren, 429 U.S. 190, 206 (1976) (quoting P. Brest, *Process of Constitutional Decisionmaking, Cases and Materials* 258 (1975)) (Court rejects suggestion that the Twenty-first Amendment can override the Equal Protection Clause of the Fourteenth Amendment).

But more fundamentally, the government relentlessly begs the question by assuming what needs to be proven: whether the First Amendment allows *any* level of government to regulate this subject through the dubious and unusual means of requiring information to be kept from the public. The few cases addressing the relationship between the Twenty-first Amendment and the First Amendment do not support any broad view that the Twenty-first Amendment provides States with additional authority to overcome the strictures of the First Amendment. These cases uphold State laws banning certain behavior in places where liquor is sold. In *California v. LaRue*, 409 U.S. 109 (1972), the Court noted that the Twenty-first Amendment increased State power over liquor licensing. Yet the central theme of the *LaRue* decision was that the State had articulated a sufficient concern about allowing liquor consumption in places where nude dancing occurs. Because conduct, even if intended to express ideas, may be more closely regulated by government, *id.* at 117, the State's prohibition of nude dancing in places licensed to sell liquor did not facially violate the First Amendment.¹¹ *Id.* at 118 (noting that the statute did not involve an across the board ban on nude dancing). The FAAA directly prohibits speech, not conduct. As such, it is not entitled to the more deferential review accorded in *LaRue*. Instead, the challenged FAAA provision must be tested

¹¹ Since *LaRue*, the Court has twice upheld similar State prohibitions of nude conduct in liquor establishments by summary disposition. *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981)(per curiam); *City of Newport, Ky. v. Iacobucci*, 479 U.S. 92 (1986)(per curiam).

against the traditional analysis applied to bans on speech. Under that test, the FAAA does not survive scrutiny.

III. THE FAAA'S ALCOHOL CONTENT LABELING PROHIBITION FAILS UNDER THE *CENTRAL HUDSON* TEST.

In *Central Hudson* the Court formalized its basic determination to place commercial speech firmly under the aegis of the First Amendment, while acknowledging the special concern to assure that such speech not further illicit ends and that it be truthful and not misleading. The interest the government seeks to further must be "substantial." But the Court appreciated that government (and government brief writers)¹² are rarely at a loss to show that what they want to do has that kind of urgency behind it. For that reason the Court went on to say that "we must determine whether the regulation directly advances the governmental interest asserted." *Central Hudson*, 447 U.S. at 566. That is, the government must bear the burden of proof in demonstrating "that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993), *quoted with approval in Ibanez*, 114 S. Ct. at 2089.¹³ The Court further required, as a fourth prong,

¹² See *Kassel v. Consolidated Freightways*, 450 U.S. 662, 680 (1981) (Brennan, J. concurring).

¹³ The nature of the burden of proof on the government in justifying a particular prohibition of commercial speech is illustrated by this Court's recent decision in *Ibanez*. There, Florida wanted to punish Ibanez, an attorney, for including factual statements about her CPA and CFP credentials on her business cards, on her stationary, and in her "yellow pages" ads. A significant focus of this Court's analysis was whether the statement of the CFP credential misled or potentially could mislead the public to assume that Ibanez was subject to state licensure requirements for that designation. 114 S. Ct. at 2089-92. Notwithstanding forceful arguments to the contrary at least with regard to the CFP credential, see 114 S. Ct. at 2092-94, (O'Connor, J., concurring in part and dissenting in part), the Court determined that the State failed to "back up its

that even such speech restrictions as directly advance the government's substantial interest not be "more extensive than necessary to serve the State's interest." *Central Hudson*, 447 U.S. at 569-70. The Court thereby recognized the natural tendency of government to blanket an area with regulation, when it has some justification for throwing a handkerchief over it, and the need to discipline that tendency when First Amendment liberties are at stake.

If this discipline the Court imposed is to do its work, then a court in assessing the government's showing that these requirements of directness and narrowness of fit have been met, must view those explanations with the rigor appropriate to its task of assuring that First Amendment liberties are not unnecessarily, routinely, or casually sacrificed. See *Discovery Network*, 113 S. Ct. at 1510 & n.13 ("if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable."). This is exactly the kind of inquiry the Tenth Circuit pursued in this case. Pet. App. at 6a-9a. If the court below had had the task of applying a rational basis test to ordinary economic regulation, the rigor with which it examined the government's showing would have been quite inappropriate, and the umbrage the government's brief takes at the close scrutiny the Tenth Circuit gave to its arguments would be justified. But this is not a simple case of economic regulation. First Amendment liberties are at stake. The court below did the job this Court set out for it in *Central Hudson*, and did it well. The government's showing in this case therefore fails the last two prongs of the *Central Hudson* test.

alleged concern that the designation CFP would mislead rather than inform." 114 S. Ct. at 2091. In doing so, the Court stressed that "we cannot allow rote invocation of the words 'potentially misleading' to supplant the Board's burden to 'demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' *Edenfield*, 507 U.S., at ___, 113 S. Ct. at 1800." *Ibanez*, 114 S. Ct. at 2090.

A. The FAAA Does Not Directly Advance The Government's Legitimate Interests.

"Directness," of course, is an evaluative concept, not one with an inflexible, objective empirical meaning. Cf. Robert E. Keeton, *Legal Cause in the Law* 5-9 (1963); Oliver W. Holmes, Jr., *The Common Law* 90-94 (1881); Guido Calabresi, *Concerning Cause and the Law of Torts*, 43 U. Chi L. Rev. 69 (1975). *Amicus* contends that the regulatory technique of requiring suppression of a true and non-misleading factual statement rarely if ever is the most direct means of achieving a proper regulatory purpose. The regulatory route that travels by way of stopping the mouth and closing the mind is peculiarly devious, for the reasons developed in the foregoing section. Rather than directing or prohibiting particular conduct by explicit commandment (e.g., barring the manufacture of malt beverages with higher than a specified alcohol content), this approach seeks to discourage consumption of high alcohol beverages by keeping from people facts as to the content of what they are consuming. The underlying reasoning—that consumers cannot effectively select for a certain characteristic if information about that characteristic is successfully kept from them—is a convoluted means, at best, of achieving the ultimate objective. *Amicus* submits that this case offers an opportunity for the Court to give substance and definition to the "directness" test by holding that it forecloses outright suppression of factual information—the shaping of conduct through ignorance—as an alternative to more forthright means of advancing a particular interest.

This is not, however, an invitation that the Court must take up in order to strike down the regulation here. As the Tenth Circuit recognized, any connection between the label information and the threat of strength wars is tenuous at best, based on the showing made here. Pet. App. at 7a-9a. First, there was no evidence to demonstrate that strength wars exist in those States or foreign countries where alcohol content information must appear on the labels. Second, Coors demonstrated that market pressure for taste and lower calories undercut any impetus for strength wars. Third, the government's suggestion that Coors's request to include

the labeling information was a subterfuge for Coors's desire to demonstrate that its malt beverages do not contain less alcohol than competing brands, even if true, did not indicate that Coors's would engage in a strength war if allowed to inform the public of the alcohol content. Pet. App. at 7a-9a.

With regard to the government's central premise—that there is a risk of strength wars which the statute works directly to prevent—there are substantial reasons to be skeptical.¹⁴ This justification relies heavily upon incidents from the immediate post-Prohibition era.¹⁵ Much of the historical evidence of strength wars in that era related to advertising campaigns and promotional statements that stressed alcohol content. See Pet. App. at 16a (quoting from summary included in 1935 House Ways and Means Committee Hearings); Cf. Pet. App. at 35a-36a (distinguishing between label information and advertising). There is no reliable indication that the mere appearance of the alcohol content information on the labels, without more, caused strength wars.

Moreover, the inability of Coors to use the label information to promote its products—because it is not contesting the FAAA's prohibitions on either the advertising of alcohol content of malt beverages or the various restrictions on the use on the label of certain words relating to the product's alcoholic strength—severely undermines any effort to link the ban to the asserted interest in avoiding strength wars. So, too, have the changes in market conditions that have occurred during the past sixty years: growth of consumer interest in taste and low calories

¹⁴ Unlike the rational basis test for economic regulation, "the *Central Hudson* test does not permit [the courts] to supplant the precise interests put forward by the State with other suppositions." *Edenfield*, 113 S. Ct. at 1798.

¹⁵ The consumer demand for strong alcohol was naturally heightened in the period immediately after the end of Prohibition. The continued validity of the suppositions arising from that era are highly doubtful.

that create market pressure against higher strength malt beverages.¹⁶ As the Tenth Circuit correctly noted, there is no record evidence of strength wars in those States that require alcohol content labeling. Pet. App. at 8a.

The fact that the government requires alcohol content labeling on wine and other types of liquor also undercuts its rationale in this case.¹⁷ If the information presents the risk of strength wars in malt beverages, why does the same information not present the risk of strength wars in wine, in bourbon, in vodka, in gin, in all other types of hard liquors. The government cannot expect this Court to take this justification seriously when faced with such a gaping hole in its logic.

¹⁶ The evidence of strength wars that the government addresses from the malt liquor market does not demonstrate that a strength war would begin in the broader malt beverage market. The customers for malt liquors concededly have a strong interest in higher alcoholic content, so it is more likely that their consumer preferences would focus on alcohol content. That supposition is not as readily transferrable to the broader malt beverage market. Moreover, it is not at all clear that the labeling ban has a notable effect in reducing the consumption of high alcohol malt liquors in those States where it is in effect, since consumers receive more generalized information about the alcohol content from the words "malt liquor" which legally appear on the label and in advertising.

¹⁷ By federal regulation, alcohol content information must appear on the labels of distilled spirits and wines. 27 C.F.R. § 5.32(a)(3) & 5.37(a)(brand label for distilled spirits must include a statement of alcohol content), *id.* § 5.33(a)(labels must be affixed firmly to bottle); *id.* § 4.32(a)(1) & 4.36(a)(brand label for wine must state alcohol content for any wine containing greater than 14% alcohol by volume; if 14% or less, the label shall describe the alcohol content by using the term "table" wine ("light" wine) or shall state the alcohol content), *id.* § 4.38(e)(all labels shall be firmly affixed to containers of wine).

B. The FAAA Ban On Labeling Information Is More Extensive Than Necessary.

In applying the fourth prong of *Central Hudson*—and thus asking whether the FAAA regulation is more extensive than necessary—one must first determine the dimension of the regulation's extensiveness that is relevant. *Amicus* submits that the answer to that question must respond to the underlying concerns that *Central Hudson* addresses—the effect of the regulations on freedom of expression. Like the third prong's limitation based on directness, if this fourth prong is to be more than window-dressing, it must be used to inquire into other ways of achieving the stated objectives and comparing the effects on freedom of expression under each approach. *Discovery Network*, 113 S. Ct. at 1510 n.13 (endorsing comparison of government's regulation with less-burdensome alternatives to make the determination). It must not be a mere talisman imposing no substantial discipline at all on government regulation of speech, as the government's brief would have it.

Taking this approach, it is clear that the provision of the FAAA suppressing relevant, accurate alcohol content labeling in any form is more restrictive of free expression than a number of alternatives that might have been pursued. The government's regulatory purpose could be accomplished as well (indeed better) by directly specifying or setting a ceiling on the alcoholic content of specified beverages. Though this might be thought to be a more extensive regulation in so far as it impinges on the freedom of brewers to brew and drinkers to drink what they like, that is emphatically not the dimension relevant to an inquiry under the First Amendment. Such a regulation, however restrictive of freedom of economic conduct (a dimension in which, since the demise of *Lochner*, government has had almost unrestricted latitude), would leave the channels of communication entirely open and would not be at all restrictive of First Amendment values.

The response might be made that government is not politically in a position to impose such a restriction. But this is a response

that exposes the vice in the means that government has chosen. For what the government would be saying in effect is that it prefers to keep citizens ignorant, because these citizens would use ordinary democratic channels to defeat a more forthright method of accomplishing the same regulatory objective. But this is exactly why *Central Hudson* did not follow the post-*Lochner* path of total constitutional permissiveness. The intelligent choices of citizens are what protect the integrity of the market regulations imposed by government.

CONCLUSION

For the reasons set forth above, *amicus* submits that the decision of the court below should be affirmed.

Respectfully submitted,

CHARLES FRIED
(Counsel of Record)
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4636

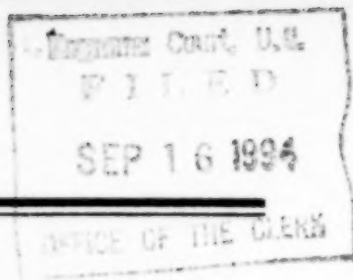
DONALD B. AYER
JAMES E. ANKLAM
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

DANIEL J. POPEO
RICHARD A. SAMP
WASHINGTON LEGAL
FOUNDATION
2009 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 588-0302

Counsel for Amicus Curiae

September 16, 1994

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No. 93-1631



IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

LLOYD BENTSEN, SECRETARY OF THE TREASURY,

v.

Petitioner,

COORS BREWING COMPANY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF AMICUS CURIAE
THE BEER INSTITUTE
IN SUPPORT OF RESPONDENT

Of Counsel:

ARTHUR DECELLE
THE BEER INSTITUTE
1225 Eye Street, N.W.
Washington, D.C. 20005
(202) 737-2337

JOHN J. WALSH
STEVEN G. BRODY
MARY ELIZABETH TAYLOR
CADWALADER, WICKERSHAM
& TAFT
100 Maiden Lane
New York, NY 10038
(212) 504-6000

P. CAMERON DEVORE *
GREGORY J. KOPTA
CHRISTOPHER PESCE
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150
Counsel for Amicus Curiae

* Counsel of Record

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1631

LLOYD BENTSEN, SECRETARY OF THE TREASURY,
Petitioner,

v.

COORS BREWING COMPANY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF AMICUS CURIAE
THE BEER INSTITUTE
IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST¹

The Beer Institute² is a national trade association representing over 250 members of the malt beverage industry. Beer Institute members produce 93% of the beer consumed in the United States. Brewers use the output of millions of acres of agricultural land to produce beverages enjoyed by over 80 million American consumers. They process millions of tons of agricultural commodi-

¹ Written consent of both parties to the filing of this brief has been filed with the Clerk of the Court as required by Supreme Court Rule 37.

² Respondent Coors Brewing Company is a member of the Beer Institute, but it did not take part in either the preparation or funding of this brief.

ties and manufacture a wide variety of other items. In several major urban areas, brewers are among the handful of remaining employers offering highly skilled manufacturing jobs. The industry employs over 2.6 million Americans from farms and granaries to breweries, packaging companies, distributors, and retailers, and pays billions of dollars in industry-specific taxes annually.

The brewing industry has a longstanding record of voluntary compliance and cooperation with federal and state government agencies. Far above and beyond their responsibility to adhere to statutes and regulations, brewers, individually and through the Beer Institute, have developed and financed numerous sustained, nationwide, educational initiatives to prevent alcohol abuse and underage drinking.³ Brewers advocate strict enforcement of laws prohibiting alcohol beverage purchases by minors. Industry members have developed and implemented many of the most successful national campaigns to keep intoxicated drivers off the road and to promote responsible consumer behavior.

³ Well known multimedia programs sponsored and financed by industry members include the following: "Know When to Say When" (Anheuser-Busch Companies); "Think When You Drink" and "Take the Lead—Become a Designated Driver" (Miller Brewing Company); "Drink Safely" and "Alcohol, Drugs, and You" (Coors Brewing Company); "Family Talk About Drinking" and "Let's Stop Underage Drinking Before It Starts" (Anheuser-Busch Companies). Further, the Beer Institute and the National Beer Wholesalers Association sponsor a nationwide distribution of "We ID" reference cards, available in English, Spanish, and Korean, to assist retailers in detecting false identification. Responsible server guides for bartenders, waiters, waitresses and a separate guide for home entertainment are produced and distributed nationally by brewers. Brewers have sponsored anti-alcohol abuse initiatives with numerous other organizations including the American Medical Association, the National Collegiate Athletic Association, the Alcohol Beverage Medical Research Foundation, and the National Commission Against Drunk Driving.

The Beer Institute speaks for its members and their employees, hard-working men and women in 50 states and the District of Columbia, who are the real strength of the industry. They share and value the First Amendment freedoms of all Americans. The members of the Beer Institute respectfully provide herein an industry-wide perspective in support of the Respondent's position on matters germane to this Court's decision.

Petitioner and his supporting amici paint a distorted picture of this industry and would have this Court restrict the commercial speech rights of its companies and customers simply because of the products involved. Not able to meet the Court's well-developed test for evaluating restrictions on commercial speech established in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), Petitioner seeks to create a separate, lower tier of First Amendment protection for commercial speech concerning alcohol beverages.

If accepted, such minimal protection would severely and adversely impact the First Amendment rights of the Beer Institute, its members, and indeed, all producers and consumers of alcohol beverages or any other lawful product that the Government—or some vocal private interest group—may target as "socially harmful." The Beer Institute accordingly urges the Court to reaffirm the principle that First Amendment rights cannot be taken away unless the government has met its burden of proving to the satisfaction of reviewing courts that its restrictions are constitutionally permissible under *Central Hudson*.

SUMMARY OF ARGUMENT

For nearly two decades, this Court has repeatedly affirmed the value of, and First Amendment protection afforded, commercial speech. Petitioner asks this Court to ignore this established body of law and reduce the Government's constitutional burden to justify its labeling ban, either by diluting the Court's *Central Hudson* test in the

context of speech concerning alcohol, or by avoiding that constitutional test altogether through “added presumptions” invoked against free speech.

Petitioner’s attempt to eviscerate constitutional protection for truthful, non-misleading commercial speech concerning alcohol beverages is not based in law or in fact. This Court long ago established—and continues to reaffirm—that the government bears the burden of proving that it has a real and substantial purpose for its restrictions on commercial speech, that the restrictions directly and materially advance that purpose, and that a reasonable fit exists between the government’s ends and its means. The Court has also stressed the role of the judiciary to critically review the government’s showing to ensure it carries that constitutional burden.

Petitioner cannot bolster his showing under *Central Hudson* by inventing a fictional federalism interest for the Government’s restrictions on speech. Nor can Petitioner avoid producing evidence to prove the statute directly and materially advances the Government’s alleged interest in curbing strength wars. Thus, Petitioner’s attempt to rely on so-called “common sense” presumptions or deference to Congressional findings must fail.

Worse than attempting to reduce his substantial burdens under *Central Hudson*, Petitioner attempts to escape them altogether by advancing an unsupportable theory that would apply “added presumptions” of constitutionality to restrictions on speech concerning alcohol beverages. Petitioner asks this Court to create an unprecedented lower tier of speech about so-called “socially harmful” products, and arbitrarily assigns beer to that sub-category. Because almost any product can be accused of being “socially harmful,” Petitioner’s test would create a new good product/bad product dichotomy to be defined at the Government’s whim. This scheme is not supported by previous cases, logic or fact, and threatens to undermine First Amendment protection for *all* commercial speech.

Petitioner—a federal officer defending a federal statute—also argues that this case implicates States’ rights under the Twenty-first Amendment. Put bluntly, this is not a Twenty-first Amendment case. Petitioner’s argument flies in the face of the plain meaning of that constitutional provision and is entirely inconsistent with this Court’s Twenty-first Amendment jurisprudence.

Petitioner, in short, offers neither authority nor logic in support of his arguments that speech concerning alcohol beverages is entitled to lesser First Amendment protection than commercial speech on other subjects. The Court should reject Petitioner’s arguments and continue to apply the *Central Hudson* test to evaluate restrictions on truthful, non-misleading commercial speech, regardless of the product or activity it concerns.

ARGUMENT

I. THE FIRST AMENDMENT AFFORDS SUBSTANTIAL PROTECTION TO COMMERCIAL SPEECH.

As recently as this year in *Ibanez v. Florida Dept. of Business and Professional Regulation*, 114 S. Ct. 2084 (1994), this Court reiterated the high value and significance it has accorded commercial speech since specifically extending First Amendment protection to it in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976). "Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n. of N.Y.*, 447 U.S. 557, 561-62 (1980). Commercial speech thus joins political speech in the First Amendment's free marketplace of ideas. Protection of commercial speech provides the public with unfettered and truthful information, affording the most effective foundation for informed decisionmaking in our open society by citizens who will "perceive their own best interests if only they are well enough informed." *Id.* at 562 (quoting *Virginia Pharmacy*, 425 U.S. at 770); see *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1512 (1993) ("In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking.").

Accordingly, the Court has provided substantial First Amendment protection for truthful commercial speech about lawful products, and its "decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626,

646 (1985); accord *Ibanez*, 114 S. Ct. at 2039; *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989); *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 478 (1988). Government regulation of commercial speech thus is subject to searching evaluation by the courts, and the government bears substantial factual burdens to justify limits—and particularly bans—imposed on such speech. *E.g.*, *Ibanez*, 114 S. Ct. 2084; *Edenfield v. Fanc*, 113 S. Ct. 1792 (1993).

This Court has emphasized the vital role of the judiciary in holding government to its First Amendment burden of proof in defending commercial speech regulations. In fact, the importance of that role is a central tenet of the Court's commercial speech cases. Under the *Central Hudson* test, as it has been elaborated in such recent cases as *Ibanez*, *Edenfield*, and *Discovery Network*, Petitioner must not only show that the Government's purpose in enacting a restriction on commercial speech is both real and substantial, but prove that the restriction directly and materially advances that purpose and is no more extensive than necessary to achieve it, considering the availability of alternative regulations with less impact on speech.

In short, Petitioner bears a heavy burden to prove that Section 205(e)(2) of the Federal Alcohol Administration Act ("FAAA"), 27 U.S.C. § 205(e)(2), is a permissible restriction on commercial speech. The district court and the Tenth Circuit correctly held Petitioner to that burden of proof, and this Court should do the same.

II. THIS COURT SHOULD REJECT PETITIONER'S ATTEMPT TO BOLSTER THE GOVERNMENTAL INTEREST BEHIND SECTION 205(e)(2) WITH A NEWLY-DISCOVERED FEDERALISM CONCERN.

This Court should reaffirm that Petitioner bears the burden of producing evidence to prove that this prohibition on truthful alcohol-content labeling is supported by a current substantial governmental interest, and that

the statute directly advances that interest to a material degree. Only if the Court is convinced that Petitioner has carried this burden can the statute's restriction on speech pass constitutional muster.

Petitioner seeks to bolster his showing of a substantial governmental interest by introducing to this Court, for the first time in this action, a new interest underlying the Government's commercial speech restriction. Before the Tenth Circuit, Petitioner "assert[ed] that the prohibition on speech contained in § 205(e)(2) was imposed to prevent strength wars among malt beverage manufacturers." *Adolph Coors Co. v. Bentsen*, 2 F.3d 355, 358 (10th Cir. 1993); cf. Petitioner's Brief at 20 (now referring to the curbing of strength wars as a "central goal" of the statute). In a transparent attempt to take advantage of this Court's decision in *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993), Petitioner suddenly asserts a "federal" purpose for the statute of "respect[ing] and facilitat[ing] . . . state regulation of alcohol pursuant to the Twenty-first Amendment." Petitioner's Brief at 20. No such interest underlies Section 205(e)(2).

Petitioner's recent discovery of a federalism interest in Section 205 highlights the importance of this Court's requirement that reviewing courts "identify with care the interests the State itself asserts" and not blindly accept the Government's assertions "if it appears that the stated interests are not the actual interests served by the restriction." *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993). The Government bears the burden of proving that the new-found federalism concern "'it recites [is] real.'" *Ibanez*, 114 S. Ct. at 2089 (quoting *Edenfield*, 113 S. Ct. at 1800).

A careful reading of Section 205(e), which applies to labeling, and its companion, Section 205(f), which applies to advertising, debunks Petitioner's superficial federalism claim. The penultimate paragraph of Section 205(f) makes it clear that neither subsection (e) nor subsection (f) applies to malt beverages unless independent State

regulation already exists concerning their labeling or advertising. The penultimate paragraph of Section 205(f) provides:

In the case of malt beverages, the provisions of this subsection *and subsection (e)* of this section shall apply to the labeling of malt beverages sold or shipped or delivered for shipment or otherwise introduced into or received in any State from any place outside thereof, or the advertising of malt beverages intended to be sold or shipped or delivered for shipment or otherwise introduced into or received in any State from anyplace outside thereof, only to the extent that the law of such State imposes similar requirements with respect to the labeling or advertising, as the case may be of malt beverages not sold or shipped or delivered for shipment or otherwise introduced into or received in such State from any place outside thereof. (emphasis added)

Section 205(e) applies only to malt beverages that move "in interstate or foreign commerce," *see* 27 U.S.C. § 205 (e), and thus does not affect purely intrastate brewers. If a State has enacted a labeling restriction to trigger Section 205(e), however, a duplicative federal restriction would have no practical effect. The State statute would already prohibit an out-of-state brewer from delivering malt beverages into the State that are not in compliance with State law. Section 205(e) thus does nothing to add to or advance any State policy and is not—nor was it intended to be—in the service of any federalism interest.⁴

The legislative history of the Section reveals that Congress worded the statute not as an "accommodation" of

⁴ Even if, as Petitioner asserts and despite its clear language to the contrary, the penultimate paragraph of Section 205(f) were subjected to a tortured interpretation in order to avoid its application to Section 205(e), Petitioner's federalism argument would be no stronger. In that case, the statute would impose federal requirements in States that have no such requirements—hardly a result that seeks to accommodate State interests.

the States or a recognition of the Twenty-first Amendment, but to avoid (1) overstepping the limits of its power under the Commerce Clause as it was then understood, and (2) putting interstate brewers at a competitive disadvantage with respect to intrastate brewers.⁵

Section 205 is markedly dissimilar to the statute upheld in *Edge Broadcasting*. That federal statute originally banned all broadcast advertising of lotteries, but with the advent of State-run lotteries, it was later amended to permit advertising of State-run lotteries by broadcasters located in lottery States. "This exemption was enacted 'to accommodate the operation of legally authorized State-run lotteries consistent with continued Federal protection to the policies of non-lottery States.'" 113 S. Ct. at 2701 (quoting S. Rep. No. 93-1404 at 2 (1974)). In contrast to the self-executing federal ban examined in *Edge*, Section 205(e)(2)'s labeling requirement is triggered only

⁵ The FAAA was debated and passed in the wake of *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), which made it clear that under the Commerce Clause the Congress had no power to regulate intrastate commerce. Because the great majority of the brewery industry at the time was intrastate, Congress knew that the federal regulation of malt beverages under Section 205 would apply only to the small percentage of malt beverages that moved in interstate commerce. See, e.g., 79 Cong. Rec. 14,568-69, 14, 571 (1935) (Statement of Rep. Fuller; Statement of Rep. Doughton). It was strenuously argued that the proposed bill was unfair because the interstate brewer "will be forced to comply with the regulations of the Federal Alcohol Administration and the fair-trade practices set forth in this bill, while the brewer engaged in the sale of beer in intrastate commerce will, in the conduct of his business, be beyond Federal regulation or control." Federal Alcohol Control Act: Hearings on H.R. 8870 Before the Comm. on Finance, 74th Cong., 1st Sess. 114 (1935) (Statement of M.J. Donnelly representing brewers shipping in interstate commerce). Congress' use of state law as a benchmark in the final bill that included Section 205 thus had nothing to do with accommodating State interests—it was a compromise that avoided giving intrastate brewers an unfair advantage over interstate brewers.

by a similar State law requirement. As already noted, Section 205(e)(2) neither facilitates nor advances any State interest and, unlike the statute in *Edge Broadcasting*, is not designed to accommodate States' conflicting policies.

Significantly, Petitioner does not argue that he has proved that Section 205(e)(2) directly and materially advances the Government's newly posited interest in facilitating State authority under the Twenty-first Amendment—or proved that a reasonable fit exists between the statute and this interest. Petitioner does suggest that Section 205(e)(2) "gives effect" to a State's decision to limit alcohol content "by making it less likely that a citizen from [one] State will travel to another state to purchase beer with a higher alcohol content." Petitioner's Brief at 22-23. As an initial matter, Petitioner has it backwards. It is State law that "gives effect" to Section 205(e), not vice versa; as discussed above, in the absence of State law, Section 205(e) has no independent substance with respect to malt beverages. Moreover, no record evidence supports Petitioner's theory that, if citizens receive accurate information on beer labels concerning alcohol content, they will travel from State to State in search of the strongest beer.

The Government thus has utterly failed to carry its burden to prove that Section 205(e)(2)'s restrictions on commercial speech satisfy either the third or fourth *Central Hudson* prong vis-a-vis its purported federalism interest. In the absence of such proof, the Government's asserted federalism interest should be seen and rejected for what it is: a blatant eleventh hour attempt to bring Section 205(e)(2) under *Edge Broadcasting*'s federalism umbrella, rather than risk relying on Petitioner's previously asserted justification of curbing strength wars among brewers.

III. PETITIONER'S RELIANCE ON "COMMON SENSE" PRESUMPTIONS AND DEFERENCE TO CONGRESSIONAL FINDINGS FAILS TO PROVE THE STATUTE DIRECTLY AND MATERIALLY ADVANCES THE GOVERNMENT'S ALLEGED INTEREST IN CURBING STRENGTH WARS.

When Petitioner actually addresses his burden to prove that Section 205(e) directly and materially advances the Government's interest in curbing strength wars, he attempts incorrectly to satisfy that burden by relying on presumptions and legislative history rather than on evidence. The third *Central Hudson* prong requires this Court to find that Petitioner has proven both that Section 205(e)(2) "directly advance[s] the state interest involved," 477 U.S. at 564, and that the statutory restriction will alleviate real harms "to a material degree." *Edenfield*, 113 S. Ct. at 1800. "Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Id.* Petitioner improperly seeks to avoid carrying this burden by conjuring up so-called "common sense" presumptions and calling for deference to Congressional findings. Neither presumptions nor deference can satisfy the Government's burden of proof.

A. Petitioner Cannot Rely on Presumptions to Satisfy His Burden of Proof.

Rather than rely on evidence, Petitioner would have this Court simply presume that Section 205(e)(2)'s commercial speech restriction directly advances the Government's interest in a material way. Petitioner first advances the purportedly "common sense" presumption that restrictions on product advertising decrease demand for that product. Petitioner then asks the Court to make a leap of faith that "a restriction on the advertising of a product characteristic will decrease the extent to which consumers select the product on the basis of that characteristic." Petitioner's Brief at 27. But Petitioner would have the Court believe that a two foot leap will land it

safely across a ten foot ditch. Petitioner's factual propositions cannot be presumed. They must be proven before they can be used to satisfy his obligation to demonstrate that Section 205(e)(2) directly advances the Government's interest in curbing strength wars.

Even assuming the validity of Petitioner's argument that labeling is equivalent to advertising, as an initial matter Petitioner offers no basis on which to presume a causal connection between advertising and demand for alcohol beverages.⁶ In fact, the Government itself through the staff of the Federal Trade Commission reviewed the literature regarding the quantitative effect of alcohol beverage advertising on consumption and concluded that there is "no reliable basis to conclude that alcohol advertising significantly affects consumption." RECOMMENDATIONS OF THE STAFF OF THE FEDERAL TRADE COMM'N, OMNIBUS PETITION FOR REGULATION OF UNFAIR AND DECEPTIVE ALCOHOL BEVERAGE ADVERTISING AND MARKETING PRACTICES, Docket No. 209-46 at 2 (March 1985). Other studies and recent reviews of the literature have reached the same conclusion.⁷ That some courts

⁶ The so-called "common sense" presumption appears to be based on the notion that advertising *must* increase overall consumption of a product or companies would not spend money on advertising. This notion, however, is based on a fundamental misunderstanding of how advertising works in a mature market, *i.e.*, a market for an established product, such as beer. The prevailing view is that in a mature market, the purpose and effect of a particular company's advertising is to encourage consumers to choose that company's brand, not to increase general consumption of that type of product. M. J. WATERSON, ADVERTISING, BRANDS AND MARKETS 19 (Advertising Ass'n Monograph, 2d ed. 1985). The impact of a restriction on advertising of a given product will vary depending on the market for the product. In any commercial speech analysis, therefore, the causal connection between the restriction and the impact on the market should be proven through evidence—not conjecture. Here the lower courts found that the evidence presented in this case did not support the government's conjecture.

⁷ See, *e.g.*, J. C. FISHER, ADVERTISING, ALCOHOL CONSUMPTION, AND ABUSE: A WORLDWIDE SURVEY 142 (1993) ("no experimental evidence exists" that advertising affects consumption); Reginald G. Smart,

have assumed a "link" between advertising and consumption in different factual settings is a far cry from proof of a causal connection between advertising and alcohol beverage consumption, which is required under *Central Hudson*. In this case, the Court cannot simply presume such a connection on the record before it. Cf. *Ibanez*, 114 S. Ct. at 2090 ("If the 'protections afforded commercial speech are to retain their force,' we cannot allow rote invocation of the words 'potentially misleading' to supplant" the government's burden of proof) (quoting *Zauderer*, 471 U.S. at 648-49) (citation omitted).

Nor should the Court accept the Government's failure to produce facts to support its restriction in favor of what amounts to an increasingly hypothetical series of presumptions inherent in Petitioner's "common sense" argument: (1) advertising increases consumption; and (2) labeling is the same as advertising; therefore, (3) labeling increases consumption; therefore, (4) placing product characteristics on labels increases consumption; therefore, (5) the placement of selected product characteristics on labels by some producers will result in their competitors' enhancing those characteristics of their own product; therefore, (6) the competitors will then label their product to promote those enhanced characteristics; therefore, (7) the original producers will respond in kind. Such entirely factual propositions are subject to a vast array of variables—including the nature of the product, the marketplace, the product's characteristics, the competi-

Does Alcohol Advertising Affect Overall Consumption? A Review of Empirical Studies, 49 J. STUDIES ON ALCOHOL 314, 316 (1988) ("The evidence indicates little impact of alcohol advertising on alcohol sales or drinking"); George R. Franke & Gary B. Wilcox, *Alcoholic Beverage Advertising and Consumption in the United States, 1964-1984*, 16 J. ADVERTISING 22, 28 (1987) (advertising does not substantially affect total alcohol consumption); see also Karen L. Sterchi, *Restraints on Alcoholic Beverage Advertising: A Constitutional Analysis*, 60 NOTRE DAME L. REV. 779 (1985) (and studies cited therein) ("Alcohol use is affected by a complex interaction of factors such as cultural, family and peer group influences").

tors, consumer tastes, the actual effect on sales, etc.—and accordingly those propositions must be proven by evidence, not simply presumed according to asserted notions of "common sense" that may or may not be accurate in a particular factual context. See *Hornell Brewing Co. v. Brady*, 819 F. Supp. 1227, 1237 (E.D.N.Y. 1993) (refusing to make a similar "leap of faith and logic"). Absent requiring such evidence, the protection afforded commercial speech would drown in a sea of presumptions and be stripped of any real meaning.

B. The Court Cannot Simply Defer to Alleged Legislative Findings to Conclude That a Restriction on Commercial Speech Directly and Materially Advances a Current Governmental Interest.

Petitioner also seeks to avoid producing sufficient evidence to satisfy the third *Central Hudson* prong by asking the Court to defer to alleged Congressional fact-finding dating to 1935, citing this Court's recent decision in *Turner Broadcasting Sys. v. FCC*, 114 S. Ct. 2445 (1994). Even if Congress made the factual findings Petitioner assumes,⁸ his argument demonstrates a fundamental misunderstanding of the significance of deference in evaluating governmental restrictions on commercial speech.

Turner Broadcasting did not involve commercial speech but was a challenge to "must-carry" regulations that require cable television operators to transmit on their cable systems the over-the-air signals of local commercial and public broadcast stations. Far from deferring to Congress' "unusually detailed statutory findings," *id.* at 2461 (plurality op. of Kennedy, J.), the Court reversed the

⁸ There is good reason to conclude that Congress made no findings concerning "strength wars" in any context except misleading or deceptive statements of actual alcohol content. *Hearings Before the Federal Alcohol Control Administration With Reference to Proposed Regulations Relative to the Labeling of Products of the Brewing Industry* (cover of draft regulations) (Nov. 1, 1934). Congress' concern was *deception* not alcohol content. The case before the Court concerns a ban on *truthful* statements of alcohol content.

grant of summary judgment in favor of the government and remanded the case to the three-judge district court panel for additional *judicial* findings of fact:

[U]nless we know the extent to which the must-carry provisions *in fact* interfere with protected speech, we cannot say whether they suppress "substantially more speech than . . . necessary" to ensure the viability of broadcast television. Finally, the record fails to provide any *judicial findings* concerning the availability and efficacy of "constitutionally acceptable less restrictive means" of achieving the Government's asserted interests.

Id. at 2472 (plurality op. of Kennedy, J.) (emphasis added) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989), and *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989)).

The Court's recent commercial speech cases echo this requirement that the Government must establish by judicial fact-finding—not deference to legislative determination—that the challenged regulation directly advances the Government's interest in a material way. See, e.g., *Ibanez*, 114 S. Ct. 2084; *Edenfield*, 113 S. Ct. 1792. Significantly, the plurality in *Turner Broadcasting* cites *Edenfield* for the proposition that in defending a regulation on speech designed "to redress past harms or prevent anticipated harms," the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broadcasting*, 114 S. Ct. at 2470 (plurality op. of Kennedy, J.). Even if harms were asserted in 1935, they may or may not exist in 1994. Regardless, the Government at all times bears the burden to prove that they currently exist or likely will develop.

Petitioner raises the specter of periodic constitutional challenges to the FAAA according to the cyclical whims of consumers' tastes. But this tactic falls far short of meeting Petitioner's burden of proving that strength wars implicate a substantial governmental interest and that Section 205(e)(2) directly alleviates that harm in a ma-

terial way. Historical legislative findings, if any, may provide some evidence of current or anticipated harm, but the Court must still determine on the evidence before it whether the existence or threat of such harm is real, see *Ibanez*, 114 S. Ct. at 2089, not simply defer to the legislative findings.⁹

IV. COMMERCIAL SPEECH CONCERNING ALCOHOL BEVERAGES IS NOT SUBJECT TO REDUCED CONSTITUTIONAL SCRUTINY UNDER *CENTRAL HUDSON*.

Not content to advocate diluting the four-part *Central Hudson* test, Petitioner has invented "added presumptions" of constitutionality that allegedly apply under *Central Hudson* to alcohol beverage labeling because the speech involves an activity defined by a government censor as "socially harmful," and because governmental restrictions on such speech purportedly were enacted to enforce the Twenty-first Amendment. The Court has never recog-

⁹ Perhaps because the Tenth Circuit did not address *Central Hudson*'s fourth prong, the Government apparently does not ask this Court to reduce its burden to prove a reasonable fit between its means and asserted ends. See, e.g., *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1509-10 (1993) (elaborating on requisite burden of proof). The Government, however, disingenuously maintains that Section 205 "prohibits only the use of [alcohol content] information in labeling and other forms of advertising, and thus allows brewers or the media to supply alcohol-content information outside the advertising context." Petitioner's Brief at 34. Presumably, a brewer may still buttonhole a person on the street to discuss alcohol content in malt beverages, but such an alternative avenue of expression is no alternative at all. See *City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2046 (1994) (finding no "adequate substitutes exist for the important medium of speech that Ladue has closed off"). Given the ban on advertising in Section 205(f), Section 205(e)(2) effectively prohibits brewers from discussing alcohol content of malt beverages in their commercial speech unless a State specifically provides otherwise. To uphold Section 205(e)(2) under *Central Hudson*'s fourth prong, therefore, the Court must find that a federal ban on commercial speech concerning the alcohol content of malt beverages reasonably fits the Government's asserted interest in curbing strength wars.

nized any such deviations from First Amendment protection of commercial speech and should flatly reject imposing any such "added presumptions."

A. This Court Has Not Sanctioned a Lower Level of Constitutional Scrutiny for Commercial Speech Concerning Activities Alleged to Be "Socially Harmful."

Petitioner creates out of whole cloth the notion that the Court's commercial speech standards apply less rigorously in the context of speech concerning so-called "socially harmful" activities. Petitioner selectively cites cases upholding commercial speech restrictions to support his theory but conveniently omits cases in which courts have struck down restrictions on speech concerning activity that a government has pronounced "socially harmful" without diminishing the applicable constitutional standards. *See, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) (alcohol beverage advertising); *Hornell Brewing*, 819 F. Supp. 1227 (alcohol beverage labeling); *Michigan Beer & Wine Wholesalers Ass'n v. Attorney General*, 142 Mich. App. 294, 370 N.W.2d 328 (Mich. Ct. App. 1985) (alcohol beverage advertising); *see generally Craig v. Boren*, 429 U.S. 190 (1976) (invalidating state alcohol beverage regulation on equal protection grounds).

The consistent theme of this Court's jurisprudence is that *all* restrictions on commercial speech are evaluated according to the standards established in *Central Hudson*—not that protection for commercial speech varies according to the legal product or activity that speech concerns. *See, e.g., Edge Broadcasting*, 113 S. Ct. 2703 (refusing to address government's argument that speech concerning "vice" activities should not be evaluated under *Central Hudson*). Once again, as it did in its brief to this Court in *Edge Broadcasting*, the Government mischaracterizes this Court's decision in *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), in an attempt to support its "socially harmful" proposition. The *Posadas* Court, however, was careful to evaluate the commercial speech ban imposed by

Puerto Rico under the *Central Hudson* test. *Id.* at 339-44. Only after concluding that the challenged restriction was constitutionally permissible under *Central Hudson* did the Court in dicta refer to any special consideration accorded to speech based on the underlying activity it concerns. Even then, the Court's discussion was in response to an argument that a legislature cannot seek to reduce demand of a legal product through restrictions on advertising. *Id.* at 346-47. The Court rejected this claim to *increased* commercial speech protection but nowhere suggested that the nature of the product justified *decreased* First Amendment scrutiny. Neither the Court's decision in *Posadas*, nor any of its subsequent decisions, provide any support for the creation of a lower level of First Amendment protection for speech concerning allegedly "socially harmful" activities.

Nor is such a lower level of protection even remotely viable without destroying the commercial speech doctrine and without granting immense power to Government to classify speech in an arbitrary manner. Rarely does a day go by without a news story describing the allegedly harmful effects of producing or consuming the products and activities that are an integral part of modern life. Virtually everything from the food we eat, to the clothes we wear, to the vast array of products we use every day, results from, or potentially leads to, activity that is "socially harmful" in someone's view. If commercial speech concerning such activities could be regulated without reference to established First Amendment principles, virtually all commercial speech would be left unprotected.

For example, motor vehicles have traditionally been considered to pose risks of a variety of social harms, including death, injury, property damage, traffic congestion, and air pollution. The driving and manufacturing of automobiles have long been subject to particularly close regulation by the States, under their police power, and the federal government, under the Commerce Clause, in areas such as licensing, traffic, safety, and emission statutes. These governments have broad authority to regulate, and

perhaps even to ban, automobiles. Acceptance of Petitioner's argument would result in a presumption of validity applicable to any restriction or prohibition on commercial speech that concerns motor vehicles and is posited on social harm, from advertising sales of the cars themselves and related products such as gasoline, tires, and repair to promoting related services and activities like motels, rental car agencies, parking garages, and car washes.

Petitioner, in his attempt to gain the power to ban speech concerning "socially harmful" products, never addresses the implicit and frightening question of who should decide what is a "socially harmful" product and on what basis that decision, and decisions concerning related speech, should be made. In startling contrast to the arguments he advances in this Court, nothing in the record suggests that the Secretary, or the Bureau of Alcohol, Tobacco and Firearms ("BATF"), has concluded that alcohol is a "bad product" or that alcohol consumption is a "socially harmful" activity. In fact, the National Institute on Alcohol Abuse and Alcoholism of the U.S. Department of Health and Human Services acknowledged in a letter to the Director of BATF that "there is a body of generally accepted evidence suggesting that moderate drinkers are at a lower risk for coronary artery disease."¹⁰ Yet, the Government asks this Court to free it from First Amendment constraints and allow it to ban commercial speech merely because it now argues that the underlying product or activity is "socially harmful," with no proof in the record to support such a claim.¹¹

¹⁰ Department of Health and Human Services (National Institute on Alcohol Abuse and Alcoholism's Office of Scientific Affairs), Scientific Review of Letters Concerning the Health Warning Statement on Labels of Alcoholic Beverages Referred to NIAAA by the Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury 15 (1992).

¹¹ The Government thus apparently believes that it knows best what products should be allowed to be advertised, and even what manner of advertising is permissible for communicating with consumers. The First Amendment protects against such ideological

In the wake of such sweeping governmental authority, what other forms of commercial speech would still receive full First Amendment protection? With the exception of commercial speech concerning products or activities specifically protected by the Constitution, *see, e.g., Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (contraceptive products); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (abortion clinic), there would be virtually no protected commercial speech if the Court accepts Petitioner's boundless "socially harmful" standard. Using alcohol beverages as its current whipping boy, the Government is asking for nothing less than abandonment of this Court's protection of commercial speech under the First Amendment—a request that the Court should firmly deny.

B. Federal Restrictions Are Not Entitled to Presumptive Validity Under the Twenty-First Amendment.

Petitioner also claims that the Twenty-first Amendment imposes an "added presumption" of constitutional validity for federal restrictions enacted ostensibly in support of State authority to regulate alcohol beverages. In addition to defying all logic, Petitioner's position is based on a fundamental misunderstanding of the nature and scope of the Twenty-first Amendment.

At the outset, Petitioner strains credulity to the breaking point by even suggesting that a constitutional provision ceding particular authority to the States entitles federal government action to a greater presumption of validity. The Twenty-first Amendment "reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause." *Capital Cities*, 467 U.S. at 712. While Congress retains Commerce Clause authority to regulate commerce in alcohol beverages, *id.* at 713, the Amendment provides no addi-

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censorship, instead trusting the speaker and the audience to "assess the value of the information presented." *Edenfield*, 113 S. Ct. at 1798.

tional power to the federal government, nor has it been interpreted to increase Congressional authority.

Petitioner nevertheless maintains that any added presumption applicable to State-imposed restrictions on alcohol beverages should be afforded to related regulations promulgated by the Federal government. The Government cites no authority for this novel theory and fails to justify its position by advancing the convoluted argument that without such a standard, a State law might be upheld while a related federal law would be struck down. This argument turns a blind eye to the very nature of our federal system, which limits federal authority in favor of action by the States (and vice versa). *See, e.g., U.S. Const. amend. X.* Our constitutional jurisprudence is replete with instances in which a State statute may be upheld while a similar federal law would be found unconstitutional. For example, most of the provisions in the Bill of Rights are applicable to the States by way of the Fourteenth Amendment, but some, like part of the Sixth and the Seventh Amendments, are not. *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 11-2 (2d ed. 1988) (and cases cited therein). A State statute modifying its citizens' right to a jury trial, therefore, may withstand constitutional scrutiny while the same action taken by Congress would be unconstitutional. *See, e.g., Apodaca v. Oregon*, 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972) (requiring unanimous jury verdict in federal criminal trials but allowing non-unanimous verdict in state trials).

Nor would a Congressional intent to support States' efforts to regulate alcohol beverages bring federal regulations within the purview of the Twenty-first Amendment. That Amendment provides that "transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, *in violation of the laws thereof*, is hereby prohibited." U.S. CONST. amend. XXI, § 2 (emphasis added). The Amendment's plain language addresses violation only of *State* law, while Congressional authority to regulate alcohol derives from the Commerce

Clause in Article I, section 8—an entirely separate constitutional provision. The validity of a federal law restricting commercial speech about alcohol beverages, therefore, should be determined by reference to the constitutional provision authorizing Congress to enact such a restriction—and by the First Amendment—not by the Amendment that sanctions the power of the States to regulate the sale of alcohol beverages.

Even if the Twenty-first Amendment were to apply in some fashion to federal as well as state alcohol regulations, the protection afforded speech under the First Amendment would be just as strong. The Twenty-first Amendment "primarily created an exception to the normal operation of the Commerce Clause," not a separate framework for analyzing restrictions on individual rights guaranteed by other constitutional provisions:

Once passing beyond consideration of the Commerce Clause, the relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful. As one commentator has remarked: "Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned."

Craig v. Boren, 429 U.S. 190, 206 (1976) (quoting PAUL BREST, *PROCESSES OF CONSTITUTIONAL DECISION-MAKING, CASES AND MATERIALS* 258 (1975)).

The Court has consistently concluded that the Twenty-first Amendment does not alter the standards for assessing the constitutional validity of government action infringing individual rights. *See id.* at 207 ("the Court has never recognized sufficient 'strength' in the [Twenty-first] Amendment to defeat an otherwise established claim of invidious discrimination in violation of the Equal Protection Clause"); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (same for Due Process Clause). The Court has reached the same conclusion in the context of the First

Amendment's Establishment Clause. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982).

The Court addressed the nature of a State's exercise of Twenty-first Amendment authority through restrictions on commercial speech in *Capital Cities*, 467 U.S. 691. In that case, Oklahoma required local cable television systems to delete advertisements for certain alcohol beverages when retransmitting out-of-state signals within Oklahoma. The Court held that Oklahoma's interest in discouraging alcohol consumption by restricting some (but not all) advertising was "modest," and "engaged[d] only indirectly the central power reserved by § 2 of the Twenty-first Amendment—that of exercising 'control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.'" *Id.* at 715 (quoting *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)). The Court found that such "indirect" exercise of Twenty-first Amendment authority may be outweighed by a federal statute—advancing the "federal objective of ensuring widespread availability of diverse cable [television] services"—much less the Constitution. *Id.* at 715-16; see generally *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (state's power to regulate liquor under the Twenty-first Amendment is subject to federal antitrust laws); *Department of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (state cannot tax liquor in violation of Export-Import Clause).

The Government completely ignores *Capital Cities* and relies on *California v. LaRue*, 409 U.S. 109 (1972), and related cases in support of its position. See Petitioner's Brief at 43 n.32. The Court in *LaRue*, however, only "relied upon the Twenty-first Amendment to 'strengthen' the State's authority to regulate live entertainment at establishments licensed to dispense liquor, at least when the performances 'partake more of gross sexuality than of communication.'" *Craig v. Boren*, 429 U.S. at 207 (quoting *LaRue*, 409 U.S. at 118); see *Doran v. Salem*

Inn, Inc., 422 U.S. 922, 932 (1975) (observing that "the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression"). The state regulations upheld in *LaRue* and subsequent cases thus were exercises of core Twenty-first Amendment power to regulate the conditions for alcohol sales on licensed premises and only indirectly regulated marginally "expressive" conduct. Indeed, the "critical fact" to the Court in *LaRue* was that the State "has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." *LaRue*, 409 U.S. at 118; see *id.* at 119-20 (Stewart, J., concurring). *LaRue* and its progeny thus stand "not for the proposition that the twenty-first amendment overrides the first but for the more modest notion that twenty-first amendment power over alcohol consumption is broad enough to embrace state power to zone strong sexual stimuli away from places where liquor is served." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 6-24, at 478 n.15 (2d ed. 1988); accord *Michigan Beer*, 142 Mich. App. at 308-9, 370 N.W.2d at 335.

The FAAA is federal—not state—regulation of alcohol. For that reason alone, *LaRue* and Petitioner's Twenty-first Amendment argument are inapposite. Moreover, Section 205(e)(2) does not regulate marginally expressive conduct as in *LaRue*, but rather is an outright ban on commercial speech. The Government's claim to an "added presumption" of constitutional validity based on the Twenty-first Amendment fails to follow from the holding of *LaRue*, much less satisfy this Court's demanding standards for prohibiting commercial speech.

CONCLUSION

Section 205(e)(2) of the FAAA specifically targets non-misleading commercial speech and categorically prohibits inclusion of truthful information in the labeling of malt beverages. Despite the Government's unsupportable claims to the contrary, this restriction must be found by a reviewing court to comply with the standards established in *Central Hudson* before it can be upheld, and neither the nature of the product underlying that speech nor the Twenty-first Amendment infuses that restriction with any additional presumption of constitutional validity.

Respectfully submitted,

Of Counsel:

ARTHUR DECELLE
THE BEER INSTITUTE
1225 Eye Street, N.W.
Washington, D.C. 20005
(202) 737-2337

JOHN J. WALSH
STEVEN G. BRODY
MARY ELIZABETH TAYLOR
CADWALADER, WICKERSHAM
& TAFT
100 Maiden Lane
New York, NY 10038
(212) 504-6000

P. CAMERON DEVORE *
GREGORY J. KOPTA
CHRISTOPHER PESCE
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150
Counsel for Amicus Curiae

* Counsel of Record

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OCTOBER TERM, 1994

LLOYD BENTSEN, SECRETARY OF THE TREASURY,
Petitioner

v.

COORS BREWING COMPANY, *Respondent*

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF THE UNITED STATES TELEPHONE
ASSOCIATION, BELLSOUTH CORPORATION, GTE
CORPORATION, NYNEX CORPORATION,
ROCHESTER TELEPHONE CORPORATION,
SOUTHERN NEW ENGLAND TELEPHONE
CORPORATION, SOUTHWESTERN BELL
CORPORATION, AND U S WEST, INC.,
AS AMICI CURIAE IN SUPPORT OF RESPONDENT

MARY McDERMOTT
*United States Telephone
Association*
900 19th Street, N.W.
Washington, D.C. 20006
Suite 800
(202) 326-7247

MICHAEL W. McCONNELL*
KENNETH S. GELLER
CHARLES A. ROTHFELD
ALAN UNTEREINER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000
* Counsel of Record for
Amici Curiae

[ADDITIONAL COUNSEL LISTED ON INSIDE COVER]

BEST AVAILABLE COPY

2972

WILLIAM BARFIELD
BellSouth Corp.
Suite 1800
1155 Peachtree Street, N.E.
Atlanta, Georgia 30367
(404) 249-2641

WARD WUESTE
MARCEIL MORRELL
GTE Corp.
P.O. Box 152092
Irving, Texas 75015
(214) 718-6314

GERALD E. MURRAY
NYNEX Corp.
1113 Westchester Ave.
White Plains, New York
(914) 644-6424

MICHAEL J. SHORTLEY, III
Rochester Telephone Corp.
180 South Clinton Ave.
Rochester, New York 14646
(716) 777-1028

FRED BRUNETTI
Southern New England
Telephone Corp.
227 Church Street
New Haven, CT 06515
(203) 771-5507

MARTIN E. GRAMBOW
Southwestern Bell Corp.
1401 I Street, N.W.
Suite 1100
Washington, D.C. 20005
(202) 326-8868

DAVID S. SATHER
U S West, Inc.
Suite 5100
1801 California Street
Denver, Colorado 80202
(303) 896-0701

QUESTION PRESENTED

Amici will address the following questions:

1. Whether, when reviewing a restriction on truthful commercial speech under the First Amendment, a court should defer to legislative findings regarding the necessity for the restriction.

2. Whether a change in circumstances may render unconstitutional a restriction on speech that was valid when enacted.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1631

LLOYD BENTSEN, SECRETARY OF THE TREASURY,
Petitioner

v.

COORS BREWING COMPANY, *Respondent*

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF THE UNITED STATES TELEPHONE
ASSOCIATION, BELL SOUTH CORPORATION, GTE
CORPORATION, NYNEX CORPORATION,
ROCHESTER TELEPHONE CORPORATION,
SOUTHERN NEW ENGLAND TELEPHONE
CORPORATION, SOUTHWESTERN BELL
CORPORATION, AND U S WEST, INC.,
AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI CURIAE

Amici are communications companies in the business of providing telecommunications services and products to the general public, including local telephone service regulated as common carriage under state laws and the federal Communications Act of 1934. *Amici* file this brief to support respondent's contention that the labelling restriction of 27 U.S.C. § 205(e)(2) is inconsistent with the First Amendment.

Amici are now involved in ongoing litigation concerning the constitutionality under the First Amendment of 47 U.S.C. § 533(b), which prohibits telephone companies from providing "video

programming" directly to subscribers within their service areas. Thus far, Section 533(b) has been struck down by two district courts applying "intermediate scrutiny" under the test of *United States v. O'Brien*, 391 U.S. 367 (1968). *Chesapeake & Potomac Telephone Co. v. United States*, 830 F. Supp. 909 (E.D. Va. 1993), app. pending, Nos. 93-2340, 93-2341 (4th Cir.); *U S West, Inc. v. United States*, No. C93-1523R (W.D. Wash. June 15, 1994), app. pending, No. 94-35775 (9th Cir.). Other suits presenting the issue are pending. *Ameritech Corp. v. United States*, No. 93-642 (N.D. Ill.); *Ameritech Corp. v. United States*, No. 93-CV-74617-CT (E.D. Mich.); *Bellsouth Corp. v. United States*, No. CV-93-B-2661-S (N.D. Ala.); *GTE California, Inc. v. FCC*, No. 93-70924 (9th Cir.); *NYNEX Corp. v. United States*, No. 93-1523 (D. Me); *Pacific Telesis Group v. United States*, No. C 93 20915(JW) (N.D. Cal.); *Southern New England Telephone Co. v. United States*, No. 3:94CV-80 (D. Conn.); *Southwestern Bell Corp. v. United States*, No. 3-94CV0193-D (N.D. Tex.).

Amici therefore have a substantial interest in the proper application of First Amendment intermediate scrutiny, which also will be used to assess the constitutionality of the restriction on commercial speech at issue in this case. And *Amici* believe that the Court, in adjudicating the validity of 27 U.S.C. § 205(e)(2), would be materially aided by an understanding of the ways in which changes in the technological, economic, or regulatory environments may undermine the justifications for restrictions on speech, an issue that *Amici* have addressed in the setting of the video programming ban. *Amici* therefore submit this brief to assist the Court in the resolution of this case.¹

SUMMARY OF ARGUMENT

1. The Government is incorrect in its assertion that substantial deference is due the purported congressional judgment that the labelling restriction of Section 205(e)(2) is necessary to forestall "strength wars." To the contrary, the Court repeatedly has held that, in assessing the constitutionality of legislation

¹ The parties' letters of consent to the filing of this brief have been filed with the Clerk pursuant to Rule 37.3 of the Rules of this Court.

restricting speech, "[d]eference to a legislative finding cannot limit judicial inquiry." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). As a consequence, the party seeking to uphold a restriction on commercial speech has the burden of justifying it. That obligation would be rendered nugatory if the courts deferred blindly to the Government's assertions about the effectiveness of or justifications for the restriction.

The Court has made clear that restrictions on commercial speech cannot be justified by speculation or unsupported assumptions. Instead, "a governmental body seeking to sustain a restriction on commercial speech must *demonstrate* that the harms it recites are real and that its restriction will *in fact* alleviate them to a substantial degree" (*Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993) (emphasis added)); where a federal statute is involved, a reviewing court must assure itself that "Congress has drawn reasonable inferences based on substantial evidence." *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2471 (1994) (plurality opinion). Here, the Government has not carried its burden: the evidence supporting the conclusion that the labelling restriction forestalls "strength wars" is, at best, conclusory and speculative.

2. Moreover, even if it were the case that materials available to Congress would have justified the enactment of the labelling prohibition in 1935, it does not follow that the ban remains enforceable *today* in light of significant changes in the marketplace. This Court has indicated repeatedly that enforcement of a statute, valid when enacted, may become unconstitutional in light of changed circumstances; the constitutionality of a restriction on speech turns on "whether, *at the time and under the circumstances*, the conditions existed which are essential to validity under the federal Constitution." *Landmark Communications*, 435 U.S. at 843-844 (emphasis added) (citation omitted). Application of this principle means that the labelling ban — which, given changes in demand, now serves principally to keep consumers from seeking out *lower*-alcohol beverages — no longer advances a significant government interest (if, that is, it ever did).

This issue may be illuminated by considering how changes in the technological, economic, and regulatory environments have

been held to bear on the constitutionality of the video programming restriction of 47 U.S.C. § 533(b). The provision codifies a regulation that was promulgated in 1970, at a time when cable television was in its infancy and it was thought that cable television operators could not survive in competition with telephone companies. In that setting, the restriction was intended to facilitate competition and diversity in programming. But whatever the force of that justification in 1970, it lacks all validity today, when cable television systems are multi-billion dollar businesses that *themselves* have monopoly status in virtually every community in the Nation. In this new environment, the restriction imposed by Section 533(b) serves only to *restrict* competition. The two courts that have decided the question therefore have held that these changed circumstances render the justification for Section 533(b) constitutionally inadequate. That same principle should be conclusive here as well.

ARGUMENT

In this brief, we address two propositions that underlie the Government's argument: first, that substantial deference is due Congress's purported empirical determination that the labelling restriction of 27 U.S.C. § 205(e)(2) is narrowly tailored to advance the purpose of preventing "strength wars"; and second, that changes in circumstances since the enactment of the FAAA are irrelevant to its constitutionality. We submit that, on both of these points, the Government's position runs counter to the fundamental logic of heightened scrutiny under the First Amendment. Even if the FAAA had been intended by Congress to combat "strength wars" — and respondent demonstrates cogently that it was not — this Court would be obligated to exercise its "independent judgment" on whether the labelling restriction substantially serves that purpose. *Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 129 (1989). This Court's precedents make clear, moreover, that if the justifications for a restriction on speech have been overtaken by events, the restriction no longer may be enforced. And when the Court brings its judgment to bear on the legislative and trial court records here, it should hold the labelling restriction unconstitutional.

A. This Court Should Not Defer to the Purported Congressional Conclusion That the Labelling Restriction is Narrowly Tailored to Advance a Substantial Governmental Interest

1. Perhaps because the evidence supporting the Government's contention that the labelling restriction actually advances a significant objective is so slight, a leitmotif of the Solicitor General's brief is the assertion that this Court must substantially defer to the purported congressional judgment that labelling restrictions will forestall a "strength war." See U.S. Br. 17, 28, 31-32. That might be so if the constitutionality of the labeling restriction were assessed under the lowest level of rationality review where the "legislative choice * * * may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Communications*, 113 S. Ct. 2096, 2102 (1993). But the Government's invocation of deference entirely fails to recognize that the First Amendment standard applicable here

is far different, of course, from the "rational basis" test used for Fourteenth Amendment equal protection analysis. * * * There it suffices if the law could be thought to further a legitimate governmental goal, without reference to whether it does so at inordinate cost. Here we require the government goal to be substantial, and the cost be carefully calculated. Moreover, since the State bears the burdens of justifying its restrictions, * * * it must affirmatively establish the substantial fit we require.

Board of Trustees v. Fox, 492 U.S. 466, 480 (1989).

As a consequence, where heightened scrutiny of government action is applied — in particular, in cases involving restrictions on speech — the Court consistently has held that "[d]eference to a legislative finding cannot limit judicial inquiry." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). "[A legislative determination] does not preclude inquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution." *Id.* at 843-844, quoting *Whitney v. California*, 274 U.S. 357, 378-379 (1927) (Brandeis, J., concurring) (bracketed material added by the Court). In this inquiry, the Court must bring

its "independent judgment" to bear. *Sable Communications*, 492 U.S. at 129. See *Whitney*, 274 U.S. at 374 (Brandeis, J., concurring).

The Court's approach has been compelled by the constitutional imperative standing behind the First Amendment.² A restriction of the sort challenged here "threatens societal interests in broad access to complete and accurate commercial information that First Amendment coverage of commercial speech is designed to safeguard. * * * [T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993). See *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-764 (1976). By the same token, content-neutral restrictions on noncommercial speech, which are subject to a searching "intermediate scrutiny" similar to that used to assess regulations of commercial expression (see *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 114 S. Ct. 2445, 2469 (1994)),³ "can significantly impair the ability of individuals to communicate their views to others" and thus impair the "unfettered interchange of ideas." *City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2045 n.13 (1994), quoting Stone,

² Heightened "intermediate" scrutiny also is applied in other circumstances — for example, in the review of classifications discriminating on the basis of gender. And it is hardly likely that the Court would defer to the legislative judgment in such cases, which tend to involve "increasingly outdated misconceptions concerning the role of women in the home." *Craig v. Boren*, 429 U.S. 190, 198-199 (1976). This, in turn, militates against excessive deference to legislative judgments in the First Amendment context; it hardly makes sense for courts to defer to different degrees when applying the same sort of intermediate scrutiny in different settings.

³ The Court has indicated that the tests are "very similar." *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2705 (1993). See *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 537 n.16 (1987). Precedents involving content-neutral restrictions on speech, or on expressive conduct (see *United States v. O'Brien*, 391 U.S. 367 (1968)), therefore have application here.

Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46, 57-58 (1987) (citation omitted).

The importance of these considerations has led the Court to hold consistently that "the party seeking to uphold a restriction on commercial speech carries the burden of justifying it." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 n.20 (1983). See, e.g., *Ibanez v. Florida Dept. of Business and Professional Regulation*, 114 S. Ct. 2084, 2088 n.7 (1994); *Edenfield*, 113 S. Ct. at 1800; *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1510 (1993); *Fox*, 492 U.S. at 480. Yet that obligation would be rendered nugatory if the courts deferred blindly to the government's assertions about the effectiveness of or justifications for the regulation. Thus

A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether * * * the legislation is consonant with the Constitution. Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.

Landmark Communications, 435 U.S. at 844. And in the specific context of commercial speech, the Court has warned that without the requirement that the government affirmatively establish the justification for a challenged restriction, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression." *Edenfield*, 113 S. Ct. at 1800. See *Ibanez*, 114 S. Ct. at 2092.

2. The Court has had occasion to address in some detail the nature of the government's burden in establishing the constitutionality of a restriction on speech, and the limited role that deference to legislative judgments plays in satisfying that burden. "The state's burden is not slight; the 'free flow of commercial information is valuable enough to justify imposing on would-be regulators the cost of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.'" *Ibanez*, 114 S. Ct. at 2089, quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 646 (1985). This "burden is

not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must *demonstrate* that the harms it recites are real and that its restriction will *in fact* alleviate them to a substantial degree.” *Edenfield*, 113 S. Ct. at 1800 (emphasis added). See *Ibanez*, 114 S. Ct. 2089.

The sort of deference postulated by the Government — in which the legislature states its concern and announces its goals, and the court declines to look behind those pronouncements — cannot be squared with these principles. As Justice Brandeis rather pungently put it, “[f]ear of serious injury cannot justify suppression of free speech and assembly. Men feared witches and burnt women.” *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring). Thus, “[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply ‘posit the existence of the disease sought to be cured.’” *Turner Broadcasting*, 114 S. Ct. at 2470 (plurality opinion) (citation omitted).

This means that it is “incumbent upon” a court “to go behind the legislative determination and examine for itself” the factual assumptions upon which the restriction is based. *Landmark Communications*, 435 U.S. at 844. In conducting this inquiry, of course, courts should not wholly disregard legislative judgments, particularly those that are predictive or discretionary in nature.⁴ But this does not mean that such judgments

are insulated from judicial review altogether. On the contrary, we have stressed in our First Amendment cases that deference to legislative findings does not “foreclose an independent judgment on the facts bearing on an issue of constitutional law.” * * * This obligation to exercise

⁴ It may be that greater deference is due the legislative judgment on whether the particular problem addressed by the restriction on speech implicates a substantial state interest; that determination necessarily involves value judgments, the validity of which may not be susceptible to mathematical verification. But the determinations whether the restriction substantially advances the state’s goal and is overbroad involve factual issues that courts plainly are competent to address.

independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence *de novo*, or to replace Congress’s factual predictions with ours. Rather, *it is to assure that, in formulating judgments, Congress has drawn reasonable inferences based on substantial evidence.*

Turner Broadcasting, 114 S. Ct. at 2471 (plurality opinion) (emphasis added) (citation omitted).

There are several considerations that have guided the Court’s inquiry in this regard. *First*, the inferences drawn by the government are insufficient to support a restriction on commercial speech if they are “speculative” or involve “conditional or remote eventualities.” *Central Hudson Gas & Electric Corp. v. Public Service Comm’n*, 447 U.S. 557, 569 (1980). *Second*, it is not enough that the assumptions underlying the regulation are “plausible” (*Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 96 n.10 (1977)); they must have a demonstrable basis in reality. And *third*, the “Court ‘may not simply assume that the [restriction] will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity.’” *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986), quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803 n.2 (1984). Instead, the Court will look not only to the legislative record, but also to evidence presented at trial relating to the actual and anticipated operation of the restriction. See *Preferred Communications*, 476 U.S. at 494-495.⁵

3. The Court’s application of these principles in its recent decisions provides considerable guidance on the application of intermediate First Amendment scrutiny here. Thus in *Edenfield*, the Court invalidated Florida’s ban on in-person solicitation of business by certified public accountants. The Court recognized that the interests asserted by the state were substantial. See 113 S. Ct. at 1799-1800. But the Court was entirely unwilling to defer to the

⁵ See, e.g., *Ibanez*, 114 S. Ct. at 2090 & n.10; *Edenfield*, 113 S. Ct. at 1801-1803; *Sable Communications*, 492 U.S. at 128; *Linmark*, 431 U.S. at 95-96 & n.10.

state's conclusory assertions about the necessity for and the effectiveness of its regulation. Instead, the Court conducted a searching examination of the record materials bearing on the effect of the challenged ban on speech.

This independent examination of evidence led the Court to find the restriction unconstitutional because the state

has not demonstrated that * * * the ban on CPA solicitation advances its asserted interests in any direct and material way. It presents no studies [establishing the dangers purportedly addressed by the regulation]. The record does not disclose any anecdotal evidence, either for Florida or for other states, that validates the [state's] supposition. This is so even though 21 States place no specific restrictions of any kind on solicitation by CPAs.

113 S. Ct. at 1800. The Court added that affidavit evidence submitted by the State was insufficient to support the restriction because it "contains nothing more than a series of conclusory statements that add little if anything to the [state's] original statement of its justification." *Id.* at 1801.

By the same token, the Court refused to defer to the state's judgment simply because the restriction on speech was a prophylactic rule that was premised on predictive judgments. That consideration, the Court explained, "in no way relieves the State of the obligation to demonstrate that it is regulating speech in order to address what is *in fact* a serious problem and that the preventative measure it proposes will contribute in a material way to solving that problem." 113 S. Ct. at 1803 (emphasis added). Under any other rule, the Court continued,

the protection afforded commercial speech would be reduced almost to nothing; comprehensive bans on certain categories of commercial speech would be permitted as a matter of course. * * * It would also be inconsistent with this Court's general approach to the use of preventative rules in the First Amendment context. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the

touchstone in an area so closely touching our most precious freedoms."

Id. at 1803-1804, quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963):

The Court took an identical approach last Term in *Ibanez*, where it invalidated another Florida restriction on certain advertising by certified public accountants. The Court declined to defer to the "State's 'unsupported assertions,'" explaining that "broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force." 114 S. Ct. at 2089, quoting *Zauderer*, 471 U.S. at 648-649. After concluding that the record materials did not support the state's assertions (see *id.* at 2090 n.10), the Court accordingly held that in the "absence of evidence," the state's "concern about the possibility of [harm] in hypothetical cases is not sufficient to rebut the constitutional presumption favoring disclosure over concealment." *Id.* at 2090, quoting *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91, 106, 110 (1990).

Most recently, in *Turner Broadcasting*, the Court was unwilling to defer blindly even to the most elaborate and detailed congressional findings. The case involved a challenge to the so-called "must-carry" provisions of the Cable Television Consumer Protection and Competition Act of 1992. The statute was enacted after three years of hearings (see 114 S. Ct. at 2454) and contained "unusually detailed statutory findings" about the purported necessity for the challenged restrictions. *Id.* at 2461. But seven Members of the Court nevertheless found the congressional findings insufficient to support the Act's restrictions on speech upon application of the intermediate scrutiny mandated by *O'Brien*.

Four Justices in the plurality found that "[o]n the state of the record developed thus far, and in the absence of findings of fact from the District Court, we are unable to conclude that the Government has satisfied" its burden of showing either that a genuine problem existed or that the must-carry provisions would not burden more speech than necessary. 114 S. Ct. at 2470. In particular, the Court noted that the Government relied on a study conducted by the Federal Communications Commission that had been considered by Congress. But the plurality itself reviewed the

study and found it insufficiently probative (see *id.* at 2471), explaining that “[w]ithout a more substantial elaboration in the District Court of the predictive or historical evidence upon which Congress relied, or the introduction of some additional evidence * * * we cannot determine whether the threat to broadcast television is real enough to overcome the challenge to the provisions * * *.” *Id.* at 2472.

Similarly, the plurality noted that “[a]lso lacking are any findings concerning the actual effects of must-carry on the speech of cable operators and cable programmers,” explaining that “[t]he answers to these and perhaps other questions are critical to the narrow tailoring step of the *O’Brien* analysis.” *Ibid.* And “[f]inally, the record fails to provide any judicial findings concerning the availability and efficacy of ‘constitutionally acceptable less effective means’ of achieving the Government’s asserted interests.” *Ibid.*, quoting *Sable Communications*, 492 U.S. at 129. The plurality therefore concluded that a remand was necessary “to permit the parties to develop a more thorough factual record.” *Ibid.* At the same time, three dissenting Justices would have held the restriction on speech unconstitutional under the *O’Brien* test even without a remand because, notwithstanding the congressional findings, the must-carry provisions “restrict too much speech.” *Id.* at 2479 (O’Connor, J., joined by Scalia and Ginsburg, JJ., concurring in part and dissenting in part).

The Court consistently has applied a similar approach to invalidate restrictions on speech that do “not sufficiently serve those public interests that are urged as its justification.” *United States v. Grace*, 461 U.S. 171, 181 (1983). And needless to say, the Court has been no less willing to do so when the legislative judgments concerned have been made by Congress. See, e.g., *Sable*, 492 U.S. at 128; *FCC v. League of Women Voters*, 468 U.S. 364, 388-399 (1984); *Bolger*, 463 U.S. at 73; *Grace*, 461 U.S. at 181-182.

4. Viewed in the light of these decisions, the Government plainly has made an insufficient showing in this case that “Congress has drawn reasonable inferences based on substantial evidence.” *Turner*, 114 S. Ct. at 2471 (plurality opinion). In contending that the labelling restriction substantially advances the asserted interest of forestalling “strength wars,” the Government places great

reliance on what it characterizes as the “historical evidence” before Congress when it enacted the FAAA in 1935. U.S. Br. 28-29. But on examination, the Government’s own description shows that the “evidence” is not probative at all. The concern that labels in 1935 were *deceptive* (see U.S. Br. 8) simply does not address the point whether an accurate recitation of alcohol content would prompt “strength wars.” And the few statements that were made around the time of the enactment of the FAAA regarding strength wars were no more than isolated, vague, and conclusory expressions of opinion. See *ibid.* Such statements, which provide “only the most limited and incremental support” for the Government’s assertion (*Bolger*, 463 U.S. at 73), plainly are inadequate to justify suppression of truthful commercial speech. See, e.g., *Ibanez*, 114 S. Ct. at 2090.

The other evidence marshalled by the Government is similarly speculative. The Government asserts, for example, that the labelling ban is justified because “[t]his Court has recognized as a matter of common sense that a restriction on the advertising of a product decreases demand for the product.” Br. 27. But while common sense may support the conclusion that demand will fall if advertising *designed to promote* consumption is prohibited, it hardly follows that prohibiting the simple recitation of alcohol content on a label will reduce demand for high-alcohol products; as Coors explains in its brief, it is at least as likely that such labelling will facilitate demand for *lower* alcohol products. And even if the Government’s contrary hypothesis is “plausible,” that is not enough to justify a ban on speech. *Linmark*, 431 U.S. at 96 n.10.

The Government’s contention that a narrower restriction could not have served the asserted interests because “Congress could reasonably have believed that a labeling restriction applicable to all types of malt beverages would be more effective than one applicable only to malt liquor” (Br. 35), meanwhile, is patently insufficient. It is premised on *no* evidence at all (see *id.* at 35-36) and presents “no evidence of *how* effective or ineffective” alternative means of achieving the congressional purpose would be. *Sable*, 492 U.S. at 129 (emphasis in original). In all, this Court has “never sustained restrictions on constitutionally protected speech on a record so bare” (*Ibanez*, 114 S. Ct. at 2091), and it should not do so now.

B. Changed Circumstances Render Enforcement of the Labelling Restriction Unconstitutional

1. The Government's submission is flawed for an additional reason as well. Even if it were the case that the materials before Congress justified the enactment of the labelling prohibition in 1935, it does not follow that the ban remains enforceable *today* in light of significantly changed circumstances in the marketplace. The Government entirely fails to come to grips with this point.

As a matter of principle, there can be no doubt that enforcement of a statute, constitutional when enacted, may become unconstitutional in light of changed circumstances. To take an obvious example, it may be that a proscription on publishing the departure dates of troop ships is enforceable during time of war. See *Near v. Minnesota*, 283 U.S. 697, 716 (1931). But we doubt that even the Government would contend that such a ban may be enforced once the war is over. The reason is plain. The constitutionality of a restriction on speech turns on "whether, at the time and under the circumstances, the conditions existed which are essential to validity under the federal Constitution." *Landmark Communications*, 435 U.S. at 843, 844, quoting *Whitney*, 274 U.S. at 378-379 (Brandeis, J., concurring) (emphasis added). And "a 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.'" *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977).

Not surprisingly, then, it has long been settled that "[a] statute valid when enacted may become invalid by a change in the conditions to which it is applied." *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U.S. 405, 415 (1935). In *Nashville, Chattanooga*, for example, Justice Brandeis, writing for the Court, explained that the state court

held that the statute [requiring railroads to pay one-half the cost of providing for grade separation to eliminate a grade crossing] was, upon its face, constitutional; that when it was passed the State had, in the exercise of its police power, authority to impose upon railroads [such costs]; and that the Court could not * * * consider "whether the provisions of the act in question have been

rendered burdensome or unreasonable by changed economic and transportation conditions" * * *. *A rule to the contrary is settled by the decisions of this Court.*

Id. at 414-415 (emphasis added). The Court explained that such a development requiring reconsideration of the statute's validity might have been worked by "the revolutionary changes incident to transportation wrought in recent years" (*id.* at 416) and remanded for factual development on the point. See *id.* at 428-434. See *Abie State Bank v. Bryan*, 282 U.S. 765, 772 (1931) (Hughes, C.J.) ("a police regulation, although valid when made, may become, by reason of later events, arbitrary and confiscatory in operation"). Needless to say, it remains the case today that "when we deal with the First Amendment, when the reason for a restriction disappears, the restriction should as well." *Burson v. Freeman*, 112 S. Ct. 1846, 1864 (1992) (Stevens, J., dissenting). See also *Tennessee v. Garner*, 471 U.S. 1, 13 (1985) (application of common law rule rendered unconstitutional by, in part, "sweeping change in the legal and technological context").

That principle has clear application here. In light of the profound "changes in the malt beverage industry and market since 1935" (Pet. App. 6a), which now finds the "vast majority" of consumers seeking lower alcohol beverages (*id.* at 8a), Congress's concern about strength wars in 1935 no longer provides an adequate justification for the labelling restriction (if it ever did). The Government's only response to this point is its assertion that "[t]he validity of an Act of Congress should not depend upon such cyclical shifts in consumption patterns" because "[e]ven if we assume that the majority preference has changed since [1935], it can change again in the future." Br. 29 (footnote omitted). But a restriction on speech, unjustified under present conditions, cannot be upheld on the entirely speculative ground that it may *become* justified at some unspecified date in the future. To return to our initial example, we doubt that even the Government would seriously contend that a ban on publishing the departure dates of

troop ships in peacetime may be supported on the ground that the country may be at war again some day in the future.⁶

2. In considering the Government's cavalier dismissal of "changes in consumer patterns," it might be useful for the Court to have before it other examples of how developments in the technological, economic, and regulatory environment may affect the assessment of a statute's constitutionality under the First Amendment. In this regard, we urge the Court to bear in mind ongoing litigation in which *amici* are now involved concerning the constitutionality of 47 U.S.C. § 533(b), a part of the Cable Act of 1984. See page 2, *supra*.

Section 533(b) prohibits telephone companies and their affiliates from providing "video programming" directly to subscribers within their service areas. The provision is derived from an FCC regulation promulgated in 1970 that barred telephone companies from providing cable television service in their telephone service areas.⁷ At the time, cable television (then called "community antenna television" or "CATV") was primarily a means of improving television reception in areas, mostly rural, where over-the-air broadcast reception was poor. See *Turner Broadcasting*, 114 S. Ct. at 2451; National Telecommunications

⁶ In arguing that changed circumstances should be disregarded, the Government cites *Bolger and Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), for the proposition that "insufficiency of [the] original motivation for [a] restriction on commercial speech does not invalidate [the] restriction if it continues to advance other legitimate purposes." U.S. Br. 29. But that principle hardly serves to validate a restriction that *no longer serves any valid purpose*. Here, in any event, the only purpose that the Government asserts as a justification for the labelling restriction is that of preventing "strength wars," which is (at least in the Government's view) the original purpose of the legislation.

⁷ *Applications of Telephone Common Carriers for Section 214 Certificates for Channel Facilities Furnished to Affiliated Community Antenna Television Systems (Final Report and Order)* ("1970 Order"), 21 F.C.C.2d 307 (1970), recons. in part, 22 F.C.C.2d 91970), aff'd sub nom. *General Telephone Co. v. United States*, 449 F.2d 846 (5th Cir. 1971)

and Information Administration, *NTIA Telecom 2000*, at 543 (Oct. 1988). It was thought that the restriction would foster competition by enabling cable operators to obtain a secure foothold in the marketplace. *In re Telephone Company-Cable Television Cross-Ownership Rules (Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking)* ("Video Dialtone Order"), 7 FCC Rcd 5781, 5848 (1992); *NTIA Telecom 2000*, at 542.

When it enacted Section 533(b) in 1984, Congress appeared to believe that the provision simply codified the FCC's regulation. H.R. Rep. No. 934, 98th Cong., 2d Sess. 56 (1984).⁸ Congress's precise goals in doing so are unclear. "Legislative materials relating to § 533(b) are sparse. No legislative findings of fact accompanied the provision." *Chesapeake and Potomac Telephone Co. v. United States*, 830 F. Supp. 909, 913 (E.D. Va. 1993) ("C & P"), app. pending, No. 93-2340 (4th Cir.).

However much sense this restriction made in 1970 (or in 1984) as a means of protecting a fledgling industry, developments on a number of fronts in the intervening years mean that Section 533(b) no longer serves (if it ever did) to advance a significant government interest. *First*, economic conditions in the cable television industry have undergone a 180 degree change. While cable served only approximately 9% of all homes in 1970, it is now a multi-billion dollar – and in virtually all communities a monopoly – industry. See *C & P*, 830 F. Supp. at 915. *Second*, radical technological changes have taken place since 1970; it is now possible for telephone companies to provide video programming over the basic telephone network. And *third*, the Federal Pole Attachment Act of 1978, 47 U.S.C. § 224, substantially eliminated concerns that telephone companies might discriminate against independent cable operators in granting access to telephone poles for the attachment of cables.

⁸ In fact, the statute made a significant (though unexplained) change: while the FCC had barred telephone companies from providing "CATV service," the congressional prohibition applies to "video programming."

Given these developments, each of the federal agencies responsible for telecommunications policy has concluded that the video programming ban reduces competition and diversity. Cf. *League of Women Voters*, 468 U.S. at 376-377 n.11 (noting that Court might be willing to revisit rules governing regulation of broadcast television upon "some signal from Congress or the FCC that technological developments have advanced"). In 1992, the FCC, after compiling a full administrative record over a five-year period, formally recommended that Congress repeal Section 533(b) to advance competition and increase the services available to the public. See *Video Dialtone Order*, 7 FCC Rcd at 5847-5851. The Department of Justice (outside the context of litigation over the constitutionality of Section 533(b)) also has concluded that telephone company "provision of video programming will have procompetitive benefits." Reply Comments of the U.S. Dept. of Justice, *Telephone Company-Cable Television Cross-Ownership Rules*, CC Dkt 87-266 at 44-46 (Mar. 13, 1992). And the National Telecommunications and Information Administration of the Department of Commerce likewise has concluded that removing Section 533(b) would "expand[] competition in the provision of video programming" and that potential dangers "are either overstated or can be effectively ameliorated by adapting existing regulatory safeguards." NTIA, *Telecommunications in the Age of Information* 235 (1991).

In light of these dramatic changes, a number of telephone companies, including several of *amici*, have challenged Section 533(b) on First Amendment grounds. And the two courts that have thus far decided the issue have applied intermediate scrutiny and held the statute unconstitutional. *Chesapeake and Potomac Telephone Co. v. United States*, *supra*; *U S West, Inc. v. United States*, *supra*.

The Section 533(b) litigation holds valuable lessons for this case. The legislative, regulatory, and trial records in the Section 533(b) litigation make clear beyond peradventure that factual developments may leave restrictions on speech without any meaningful support. And when assessing the Government's dismissive comments in this case about the significance of "cyclical shifts in consumption patterns," the Court should remain sensitive to the fact that changed circumstances bearing on the

constitutionality of other legislation may be irrevocable and profound. We submit that here as well, the Government has failed to demonstrate any continuing justification for the labelling restriction in light of the changes in market conditions identified by respondent and the courts below. The Court therefore should hold that restriction unconstitutional.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

MARY McDERMOTT
United States Telephone
Association
900 19th Street, N.W.
Washington, D.C. 20006
Suite 800
(202) 326-7247

MICHAEL W. McCONNELL*
KENNETH S. GELLER
CHARLES A. ROTHFELD
ALAN UNTEREINER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 463-2000
* Counsel of Record for
Amici Curiae

WILLIAM BARFIELD
BellSouth Corp.
Suite 1800
1155 Peachtree Street, N.E.
Atlanta, Georgia 30367
(404) 249-2641

FRED BRUNETTI
Southern New England
Telephone Corp.
227 Church Street
New Haven, CT 06515
(203) 771-5507

WARD WUESTE
MARCEIL MORRELL
GTE Corp.
P.O. Box 152092
Irving, Texas 75015
(214) 718-6314

MARTIN E. GRAMBOW
Southwestern Bell Corp.
1401 I Street, N.W.
Suite 1100
Washington, D.C. 20005
(202) 326-8868

GERALD E. MURRAY
NYNEX Corp.
1113 Westchester Ave.
White Plains, New York
(914) 644-6424

MICHAEL J. SHORTLEY, III
Rochester Telephone Corp.
180 South Clinton Ave.
Rochester, New York 14646
(716) 777-1028

DAVID S. SATHER
U S West, Inc.
Suite 5100
1801 California Street
Denver, Colorado 80202
(303) 896-0701

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